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**DEPARTMENT OF JUSTICE**
**Antitrust Division**

***United States v. B.S.A. S.A., LAG Holding, Inc., and The Kraft Heinz Company*; Complaint, Proposed Final Judgment, and Competitive Impact Statement**

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), that a Complaint, a proposed Final Judgment, an Asset Preservation and Hold Separate Stipulation and Order, and a Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America v. B.S.A. S.A., LAG Holding, Inc., and The Kraft Heinz Company,* Civil Action No. 1:21-cv-02976-RBW. On November 10, 2021, the United States filed a Complaint alleging that B.S.A. S.A.'s proposed acquisition of The Kraft Heinz Company's natural cheese business would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, requires B.S.A. S.A. to divest The Kraft Heinz Company's Athenos business—including the worldwide rights to the Athenos brand, under which The Kraft Heinz Company sells feta cheese and other products—to Emmi Roth USA, Inc. or an alternative acquirer approved by the United States. The proposed Final Judgment also requires B.S.A. S.A. to divest The Kraft Heinz Company's Polly-O business—including the worldwide rights to the Polly-O brand, under which The Kraft Heinz Company sells ricotta and other cheeses—to BelGioioso Cheese Inc. or an alternative acquirer approved by the United States.

Copies of the Complaint, proposed Final Judgment, Asset Preservation and Hold Separate Stipulation and Order, and Competitive Impact Statement are available for inspection on the Antitrust Division's website at https://www.justice.gov/atr/case/us-v-lactalis-et-al and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice

regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the *Federal Register*. Comments should be submitted in English and directed to Eric D. Welsh, Chief, Healthcare and Consumer Products Section, Antitrust Division, Department of Justice, 450 Fifth Street NW, Suite 4100, Washington, DC 20530 (email address: Eric.Welsh@usdoj.gov).

**Suzanne Morris,**
*Chief, Premerger and Division Statistics,*
*Antitrust Division.*

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA,<br>United States Department of Justice<br>Antitrust Division<br>450 Fifth Street NW, Suite 4100<br>Washington, DC 20530,<br><br>*Plaintiff*,<br>v.<br>B.S.A. S.A.,<br>33 Avenue du Maine<br>Paris, France 75015,<br><br>LAG HOLDING, INC.,<br>2376 South Park Avenue<br>Buffalo, NY 14220,<br><br>and<br><br>THE KRAFT HEINZ COMPANY,<br>One PPG Plaza<br>Pittsburgh, PA 15222,<br><br>*Defendants*. | Civil Action No.: |

**COMPLAINT**

The United States of America brings this civil antitrust action to enjoin B.S.A. S.A. and its subsidiary, LAG Holding, Inc. (together "Lactalis"), from acquiring the natural cheese business of The Kraft Heinz Company ("Kraft Heinz") in the United States. This combination would bring together the two largest suppliers of feta cheese in the United States and the two largest suppliers of ricotta cheese in the metropolitan and surrounding area of New York, New York, and in four metropolitan and surrounding areas in Florida. As a result, the proposed combination of Lactalis and Kraft Heinz would likely lead to higher prices, lower quality, and reduced choice for retail consumers of these cheeses, at a time when many Americans are struggling to meet rising food prices. The transaction should be enjoined to prevent American consumers from suffering these likely anticompetitive harms. The United States alleges as follows:

## I. NATURE OF THE ACTION

1. Grocery and supermarket purchases account for a significant portion of the household budget for American families, and Americans' food bills are rising. According to the USDA's Economic Research Service, grocery prices have increased in 2021, and are expected to further increase in 2022, putting more pressure on American consumers who are struggling to make ends meet. Competition plays an important role in keeping down the prices for grocery items, such as cheese, that Americans purchase and use every day.

2. B.S.A. S.A. is one of the world's largest dairy companies, manufacturing and selling cheese in the United States through its subsidiaries, LAG Holding, Inc. and Lactalis American Group, Inc. In the United States, Lactalis sells natural cheeses primarily under the Galbani and Président brand names. Kraft Heinz is one of the largest food products and beverage companies in the world. Kraft Heinz is also the largest supplier of natural cheeses to grocery stores and other retail outlets in the United States, selling natural cheeses primarily under the Kraft, Cracker Barrel, Athenos, and Polly-O brand names.

3. On September 15, 2020, B.S.A. S.A. agreed to pay approximately $3.2 billion to acquire Kraft Heinz's (1) natural cheese business in the United States, which includes feta, ricotta, and many other types of cheeses, but excludes processed cheese and cream cheese, (2) grated cheese business in Canada, and (3) entire cheese business outside North America (the "proposed transaction").

4. The proposed transaction would combine the two largest suppliers of feta cheese sold to retailers in the United States, and the two largest suppliers of ricotta cheese sold to retailers in five metropolitan and surrounding areas located in New York and Florida. If allowed to proceed, the merged firm's brands would control approximately 65% of all retail feta sales (brands and private label) nationwide, with its next closest

branded competitor controlling approximately 6% of retail feta sales. For ricotta, the merged firm's brands would control approximately 70% of all retail sales (brands and private label) in the metropolitan and surrounding area of New York, New York, with its next closest branded competitor controlling approximately 7% of retail ricotta sales in that market. And in each of the four metropolitan and surrounding areas in Florida identified below, the merged firm's brands would control over 65% of all retail ricotta sales (brands and private label), with its next closest branded competitor in each of the markets controlling no more than 2% of retail ricotta sales.

5. Defendants are particularly close competitors for the sale of feta (through Lactalis's Président brand and Kraft Heinz's Athenos brand) and ricotta (through Lactalis's Galbani brand and Kraft Heinz's Polly-O brand) to retailers. These strong brands allow Lactalis and Kraft Heinz to compete aggressively with each other in the sale of feta and ricotta cheese in the relevant markets, which has resulted in lower prices and innovative products, such as Lactalis's double cream ricotta cheese and Kraft Heinz's flip top container for Athenos crumbled feta cheese, that benefit consumers.

6. The proposed transaction would eliminate this competition, likely leading to higher prices, reduced innovation, and fewer choices for these products for retailers in the relevant markets. For these reasons, the proposed transaction is likely to substantially lessen competition in the sale of feta and ricotta cheeses in the relevant markets, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. The Court should, therefore, enjoin the proposed transaction.

## II. JURISDICTION AND VENUE

7. The United States brings this action pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

8. Defendants sell cheeses, including feta and ricotta, in the flow of interstate commerce, and their sale of these products substantially affects interstate commerce, including in this judicial district. This Court therefore has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a), and 1345.

9. Defendants have each consented to personal jurisdiction and venue in this judicial district for purposes of this action. Venue is therefore proper in this district under 28 U.S.C. 1391(b) and (c).

## III. THE DEFENDANTS

10. B.S.A. S.A. is a French company operating under the name Lactalis Group. B.S.A. S.A. is a corporation organized and existing under the laws of France, with its headquarters in Laval, France. It is one of the largest dairy companies in the world.

11. LAG Holding, Inc. is a subsidiary of B.S.A. S.A. It is a Delaware corporation with its headquarters in Buffalo, New York. LAG Holding, Inc. and its subsidiary, Lactalis American Group, Inc., generated natural cheese sales of approximately $429 million at retail outlets in the United States in 2020.

12. Kraft Heinz is a Delaware corporation co-headquartered in Pittsburgh, Pennsylvania, and Chicago, Illinois. Kraft Heinz is one of the largest food products and beverage companies in the world. Retail sales of its natural cheeses in the United States amounted to over $2.2 billion in 2020.

## IV. RELEVANT MARKETS

13. A typical starting point for merger analysis is defining a relevant market, which has both a product and a geographic dimension. Courts define relevant markets to help determine the areas of competition most likely to be affected by a merger. As described below, both feta cheese sold to retailers across the United States and ricotta

cheese sold to retailers in the metropolitan and surrounding area of New York, New York (the "New York Metro Market") and in four metropolitan and surrounding areas in Florida—Miami/Ft. Lauderdale, Tampa/St. Petersburg, Orlando, and Jacksonville (collectively, the "Florida Metro Markets")—are relevant markets.

### A. Relevant Product Markets

14. Cheeses are sold to retailers as branded cheeses or private label cheeses. A branded cheese bears a brand name controlled by the cheese supplier (*e.g.*, Kraft Heinz's Athenos and Polly-O brands and Lactalis's Président and Galbani brands). A branded cheese is usually carried by multiple retailers. A private label cheese is usually sold under a name owned by the retailer (*e.g.*, Wal-Mart's Great Value private label), and is typically offered only in that retailer's stores.

15. Grocery stores and other food retailers act as proxies for individual consumers and seek to offer the variety of products demanded by their customers. As a result, retailers strive to carry products and brands that their customers value, and may vary their offerings to meet local customer demand. For example, Polly-O was founded over 100 years ago in the New York City area, where it became quite popular. As residents of the New York City area visited or moved to Florida, they took their Polly-O brand loyalty with them. Thus, Polly-O ricotta cheese has greater competitive significance in grocery stores and other retailers in the New York Metro Market and the Florida Metro Markets than in other areas of the country.

#### 1. Ricotta Cheese Sold to Retailers is a Relevant Product Market

16. Ricotta is a soft cheese that originated in Italy. It is primarily used as an ingredient in food dishes.

17. There are no reasonable substitutes for ricotta cheese for most consumers. A hypothetical monopolist supplier of ricotta cheese to retailers likely would find it profitable to increase its prices by at least a small but significant non-transitory amount.

Consumers are unlikely to sufficiently reduce their purchases of ricotta cheese or shift to a different cheese or other products to render such a price increase unprofitable. As a result, retailers, buying on behalf of the consumer, are also unlikely to sufficiently reduce purchases of ricotta cheese to render such a price increase unprofitable. Accordingly, ricotta cheese sold to retailers is a relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act.

18. Defining a market for ricotta cheese that is sold to retailers is consistent with industry recognition and practice. Suppliers of ricotta cheese to retailers typically (1) monitor the retail prices of competing ricotta cheeses and set their prices and promotional spending accordingly, (2) do not set the price they charge for ricotta cheese based on the prices of other cheeses or other consumer products, (3) track their sales to retailers separately from their sales to other distribution channels (*i.e.*, foodservice and the ingredients or industrial channels), (4) have sales employees dedicated to serving retailers, and (5) sell ricotta cheese to retailers in packaging and package sizes that are different than that used for ricotta sold through other distribution channels. These factors further support that ricotta cheese sold to retailers is a relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act.

**2. Feta Cheese Sold to Retailers is a Relevant Product Market**

19. Feta cheese originated in Greece. It is primarily used as an ingredient in food dishes.

20. There are no reasonable substitutes for feta cheese for most consumers. A hypothetical monopolist supplier of feta cheese to retailers likely would find it profitable to increase its prices by at least a small but significant non-transitory amount. Consumers are unlikely to sufficiently reduce their purchases of feta cheese or shift to a different cheese or other products to render such a price increase unprofitable. As a result, retailers, buying on behalf of the consumer, are also unlikely to sufficiently reduce

purchases of feta cheese to render such a price increase unprofitable. Accordingly, feta cheese sold to retailers is a relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act.

21. Defining a market for feta cheese that is sold to retailers is consistent with industry recognition and practice. Suppliers of feta cheese to retailers typically (1) monitor the retail prices of competing feta cheeses and set their prices and promotional spending accordingly, (2) do not set the price they charge for feta based on the prices of other cheeses or other consumer products, (3) track their sales to retailers separately from their sales to other distribution channels, (4) have sales employees dedicated to serving retailers, and (5) sell feta cheese to retailers in packaging and package sizes that are different than that used for feta sold through other distribution channels. These factors further support that feta cheese sold to retailers is a relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act.

**B. Relevant Geographic Markets**

22. The relevant geographic markets for analyzing the effects of the proposed transaction on competition for feta and ricotta cheeses sold to retailers are best defined by reference to the locations of the retailers that purchase feta and ricotta cheeses in order to then sell those products to consumers.

23. This approach to defining the relevant geographic markets is appropriate because suppliers of feta and ricotta cheeses to retailers assess the competitive conditions in particular localities, including local demand for feta and ricotta cheeses, as well as local demand for the suppliers' own brands as compared to competing brands or to private label offerings. As a result, suppliers of feta and ricotta cheeses can charge different prices, or offer different levels of promotional funding, to retailers in different locations based on local competitive conditions. If targeted for a price increase or reduction in promotional funding, retailers in a given locality would be unlikely to be

able to render such conduct unprofitable by purchasing feta or ricotta cheeses outside of the relevant geography and transporting it to their retail location.

24. Where ricotta and feta cheese suppliers can successfully vary prices and promotional funding based on retailer customer location, the goal of geographic market definition is to identify the area encompassing the location of potentially targeted customers. The relevant geographic markets identified below encompass the locations of retailers that would likely be targeted by suppliers for price increases as a result of the proposed transaction.

### 1. The Relevant Geographic Markets for Ricotta Cheese Sold to Retailers Are the New York Metro Market and the Florida Metro Markets

25. The relevant geographic markets for the sale of ricotta cheese to retailers that will be harmed by the proposed transaction are the New York Metro Market and the Florida Metro Markets. In each of these markets, Defendants compete vigorously with each other for sales of ricotta cheese to retailers that resell those products to consumers. Defendants' Polly-O and Galbani ricotta brands combined would account for approximately 70% of all ricotta cheese sales by retailers in the New York Metro Market and over 65% of all ricotta cheese sales by retailers in each of the Florida Metro Markets.

26. A hypothetical monopolist supplier of ricotta cheese to retailers in the New York Metro Market and in each of the Florida Metro Markets likely would increase its price by at least a small but significant and non-transitory amount. Therefore, the New York Metro Market and each of the Florida Metro Markets are relevant geographic markets and sections of the country within the meaning of Section 7 of the Clayton Act.

### 2. The Relevant Geographic Markets for Feta Cheese Sold to Retailers Are Individual Metropolitan and Surrounding Areas, but can be Analyzed on a National Basis for Convenience

27. The relevant geographic markets for the sale of feta cheese to retailers may be defined as narrowly as individual metropolitan and surrounding areas. A

hypothetical monopolist supplier of feta cheese to retailers in any given metropolitan and surrounding area in the United States likely would find it profitable to increase its prices by at least a small but significant and non-transitory amount. Therefore, each metropolitan and surrounding area in the United States is a relevant geographic market and section of the country within the meaning of Section 7 of the Clayton Act.

28. In circumstances where competitive conditions are similar, it is appropriate to aggregate local markets into a larger relevant market for analytical convenience. The competitive conditions across the country are similar for the sale of feta cheese to retailers who purchase the cheese for resale to consumers. Kraft Heinz's Athenos feta and Lactalis's Président feta are the two top-selling feta cheese brands in the United States, and combined, the two brands would account for approximately 65% of all feta cheese sales by retailers nationally. While some regional brands of feta cheese exist, none place a significant competitive constraint on Defendants in any particular metropolitan and surrounding area. Therefore, it is appropriate to analyze competition for the sale of feta cheese to retailers on a national basis.

## V. THE PROPOSED TRANSACTION IS LIKELY TO SUBSTANTIALLY LESSEN COMPETITION FOR THE SALE OF RICOTTA AND FETA CHEESES TO RETAILERS

29. The proposed transaction would combine the two largest suppliers of ricotta cheese to retailers in the New York Metro Market and in each of the Florida Metro Markets, and the two largest suppliers of feta cheese to retailers nationally, resulting in a substantial increase in concentration in these markets.

30. The Supreme Court has held that mergers that significantly increase concentration in already concentrated markets are presumptively anticompetitive and therefore presumptively unlawful. To measure market concentration, courts often use the Herfindahl-Hirschman Index ("HHI") as described in the *U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines*. HHIs range from 0 in

markets with no concentration to 10,000 in markets where one firm has a 100% market share. According to the *Horizontal Merger Guidelines*, mergers that increase the HHI by more than 200 and result in an HHI above 2,500 in any relevant market or line of commerce are presumed to be anticompetitive and, therefore, unlawful.

31. The proposed transaction would eliminate substantial head-to-head competition between Defendants in both ricotta and feta cheese sales to retailers, leading to higher prices, lower quality, and less innovation for these products in the relevant markets.

32. The significant increase in market concentration that the proposed transaction would produce in the relevant markets, combined with the loss of head-to-head competition between Defendants, is likely to substantially lessen competition in violation of Section 7 of the Clayton Act.

### A. The Proposed Transaction is Presumptively Unlawful and is Likely to Substantially Lessen Head-to-Head Competition for the Sale of Ricotta Cheese to Retailers

33. In the New York Metro Market, Defendants are the two largest suppliers of ricotta cheese to retailers, and their Polly-O and Galbani ricotta cheese brands combined would account for approximately 70% of all ricotta cheese sales by retailers in that market. In the New York Metro Market, the proposed transaction would increase the HHI by more than 2,400 points, resulting in a highly concentrated market with a post-acquisition HHI of more than 5,000 points. Thus, the proposed transaction is presumptively unlawful in the New York Metro Market.

34. In each of the Florida Metro Markets, Defendants are also the two largest suppliers of ricotta cheese to retailers, and their Polly-O and Galbani ricotta cheese brands combined would account for over 65% of all ricotta cheese sales by retailers. In each of the Florida Metro Markets, the proposed transaction would increase the HHI by more than 1,500 points, resulting in highly concentrated markets, each with a post-

acquisition HHI of more than 4,400 points. Thus, the proposed transaction is presumptively unlawful in each of the Florida Metro Markets.

35. Defendants are particularly close competitors for ricotta cheese sold to retailers in the New York Metro Market and the Florida Metro Markets. They compete aggressively with each other on pricing and promotions for ricotta cheese and in offering new and innovative products and features, such as double cream ricotta and packaging design.

36. The president of the Lactalis American Group Retail Division recognized this fact in February 2019, noting that, "through aggressive pricing we managed to grow the Galbani share at the expense of [Kraft Heinz's] Poly-O [*sic*] from 2015 to 2018" in the ricotta cheese category. Additionally, in January 2020, a Lactalis senior sales manager learned of an Easter price promotion on ricotta cheese that Polly-O was offering in the Northeast. Lactalis responded by improving its own Easter price promotion on ricotta cheese.

### B. The Proposed Transaction is Presumptively Unlawful and is Likely to Substantially Lessen Head-to-Head Competition for the Sale of Feta Cheese to Retailers

37. Defendants are the two largest suppliers of feta cheese to retailers in the United States, and their Athenos and Président feta cheese brands combined would account for approximately 65% of all feta cheese sales by retailers nationally. In a national market for feta cheese sold by retailers, the proposed transaction would increase the HHI by more than 2,100 points, resulting in a highly concentrated market with a post-acquisition HHI of more than 4,300 points. Thus, the proposed transaction is presumptively unlawful.

38. Defendants are particularly close competitors for feta cheese sold to retailers in metropolitan and surrounding areas throughout the United States. Kraft Heinz's Athenos brand and Lactalis's Président brand are the two top-selling retail brands

of feta cheese sold in the United States. A Lactalis executive referred to them as the "two national leaders" in feta cheese. They compete vigorously on prices, promotions, flavor, texture, variety (*e.g.*, fat free, traditional), and quality.

39. For example, in November 2020, a national sales manager at Kraft Heinz lamented that Kraft Heinz was "in a really bad position" at a supermarket chain because it "lost the feta business in March when [we] were undercut by Lactalis." Similarly, a Lactalis marketing plan for feta cheese identified an objective of "steal[ing] market share from [Kraft Heinz's] Athenos" in 2021.

## VI. ABSENCE OF COUNTERVAILING FACTORS

40. New entry and expansion by competitors are unlikely to be timely and sufficient enough to offset the proposed transaction's likely anticompetitive effects. Barriers to entering these markets are high and include the substantial time and expense required to build a brand's reputation and overcome existing consumer preferences through promotional and advertising activity as well as the substantial sunk costs needed to secure the distribution and placement of a new entrant's products in retail outlets (*e.g.*, paying slotting fees to obtain shelf space at supermarkets and other food retailers).

41. The proposed transaction is unlikely to generate verifiable, merger-specific efficiencies sufficient to reverse or outweigh the anticompetitive effects that are likely to occur as a result of the proposed transaction.

## VII. VIOLATIONS ALLEGED

42. The United States hereby incorporates the allegations of paragraphs 1 through 41 above as if set forth fully herein.

43. The proposed transaction is likely to substantially lessen competition in interstate trade and commerce, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

44. Unless enjoined, the proposed transaction would likely have the following anticompetitive effects, among others:

a. substantially lessening head-to-head competition between Defendants for the sale of feta cheese to retailers in the United States and ricotta cheese to retailers in the New York Metro Market and in each of the Florida Metro Markets;

b. substantially lessening competition generally in the market for feta cheese sold to retailers in the United States and ricotta cheese sold to retailers in the New York Metro Market and in each of the Florida Metro Markets;

c. causing prices to be higher than they would be otherwise for feta cheese sold to retailers in the United States and ricotta cheese sold to retailers in the New York Metro Market and in each of the Florida Metro Markets; and

d. reducing choice and innovation for feta cheese sold to retailers in the United States and ricotta cheese sold to retailers in the New York Metro Market and in each of the Florida Metro Markets.

## VIII. REQUEST FOR RELIEF

45. The United States requests that the Court:

a. adjudge and decree the proposed transaction to be unlawful and in violation of Section 7 of the Clayton Act, 15 U.S.C. 18;

b. permanently enjoin and restrain Defendants and all persons acting on their behalf from carrying out the proposed transaction, or from entering into or carrying out any other contract, agreement, plan, or understanding, the effect of which would be to combine Defendants in the relevant markets alleged above;

c. award the United States its costs for this action; and

d. award the United States such other relief as the Court deems just and proper.

Dated: November 10, 2021
Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA


_____
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*LEAD ATTORNEY TO BE NOTICED

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

*Plaintiff*,

v.

B.S.A. S.A.,

LAG HOLDING, INC.,

and

THE KRAFT HEINZ COMPANY,

*Defendants*.

# PROPOSED FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on November 10, 2021;

AND WHEREAS, the United States and Defendants, B.S.A. S.A., LAG Holding, Inc., and The Kraft Heinz Company, have consented to entry of this Final Judgment without the taking of testimony, without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party relating to any issue of fact or law;

AND WHEREAS, Defendants agree to make certain divestitures to remedy the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants represent that the divestitures and other relief required by this Final Judgment can and will be made and that Defendants will not later raise a claim of hardship or difficulty as grounds for asking the Court to modify any provision of this Final Judgment;

NOW THEREFORE, it is ORDERED, ADJUDGED, AND DECREED:

## I. JURISDICTION

The Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act (15 U.S.C. 18).

## II. DEFINITIONS

As used in this Final Judgment:

A. "Acquirer" or "Acquirers" means the entity or entities approved by the United States in its sole discretion to which Defendants divest any of the Divestiture Assets.

B. "Acquirer of the Athenos Divestiture Assets" means Emmi Roth or another entity approved by the United States in its sole discretion to which Defendants divest the Athenos Divestiture Assets.

C. "Acquirer of the Polly-O Divestiture Assets" means BelGioioso or another entity approved by the United States in its sole discretion to which Defendants divest the Polly-O Divestiture Assets.

D. "Athenos Brand Name" means Athenos and any other name that uses, incorporates, or references the Athenos name.

E. "Athenos Divestiture Assets" means all of Defendants' rights, titles, and interests in and to all property and assets, tangible and intangible, wherever located, relating to or used in connection with the Athenos Divestiture Business, including:

1. the Athenos Brand Name, including (a) the right to the exclusive use of the Athenos Brand Name in all sales channels (including the retail, foodservice, and ingredients or industrial channels), and (b) all other intellectual property owned, licensed, or sublicensed, either as licensor or licensee, including (i) patents, patent applications, and inventions and discoveries that may be patentable, (ii) registered and

unregistered copyrights and copyright applications, and (iii) registered and unregistered trademarks, trade dress, service marks, trade names, and trademark applications;

2. all contracts, contractual rights, and customer relationships, and all other agreements, commitments, and understandings, including agreements with suppliers, manufacturers, co-packers, and retailers, teaming agreements, leases, and all outstanding offers or solicitations to enter into a similar arrangement;

3. all licenses, permits, certifications, approvals, consents, registrations, waivers, and authorizations, including those issued or granted by any governmental organization, and all pending applications or renewals;

4. all records and data, including (a) customer lists, accounts, sales, and credits records, (b) production, repair, maintenance, and performance records, (c) manuals and technical information Defendants provide to their own employees, customers, suppliers, agents, or licensees, (d) records and research data concerning historic and current research and development activities, including designs of experiments and the results of successful and unsuccessful designs and experiments, and (e) drawings, blueprints, and designs; and

5. all other intangible property, including (a) commercial names and d/b/a names, (b) technical information, including recipes and formulas, (c) computer software and related documentation, know-how, trade secrets, design protocols, specifications for materials, specifications for parts, specifications for devices, safety procedures (e.g., for the handling of materials and substances), quality assurance and control procedures, (d) design tools and simulation capabilities, and (e) rights in internet web sites and internet domain names.

*Provided, however*, that the assets specified in Paragraphs II.E.1–5 above do not include the Athenos Transitional Manufacturing Assets or the Athenos Transitional Services Contracts.

F. "Athenos Divestiture Business" means the worldwide business of the sale of Athenos Products by Kraft Heinz.

G. "Athenos Personnel" means all full-time, part-time, or contract employees of Kraft Heinz, wherever located, whose job responsibilities relate in any way to the Athenos Divestiture Assets, at any time between September 15, 2020, and the date on which the Athenos Divestiture Assets are divested. The United States, in its sole discretion, will resolve any disagreement relating to which employees are Athenos Personnel.

H. "Athenos Products" means any product that Kraft Heinz sold, sells, or has plans to sell under the Athenos Brand Name anywhere in the world.

I. "Athenos Transitional Manufacturing Assets" means:

1. production lines numbers 25 and 26, which are used by the Athenos Divestiture Business for crumbling and packaging feta and are located at Kraft Heinz's facility at 1007 Townline Road, Wausau, Wisconsin 54403;

2. the feta packaging mold used to produce plastic feta lids and containers, which was purchased by Kraft Heinz in 2021 and is located at the facilities of RPC Bramlage-WIKO USA, Inc. in Morgantown, Pennsylvania; and

3. the contracts and agreements between Kraft Heinz and each of the following: (a) Agropur, dated January 13, 2021; (b) J. Rettenmaier USA LP, dated January 1, 2021; (c) International Paper Company, dated January 1, 2016, and last amended December 31, 2020; (d) Berry Global, Inc., dated April 1, 2014, supplemented September 22, 2014, and last amended August 1, 2019; (e) Weber Packaging Solutions, Inc., dated January 1, 2020; and (f) Bramlage, Inc. d/b/a RPC Bramlage Morgantown (the "RPC Agreement"), dated October 23, 2017.

J. "Athenos Transitional Services Contracts" means the contracts and agreements between Kraft Heinz and each of the following: (a) Prairie Farms, dated

November 3, 2020; (b) Great Lakes Cheese Company, Inc., dated January 1, 2021, and supplemented and amended on January 1, 2021; (c) Marathon Cheese Corporation, dated April 10, 2021, and supplemented on April 10, 2021; (d) Cedar's Mediterranean Foods, Inc., dated November 1, 2020, and supplemented on February 1, 2021; and (e) Saputo Cheese USA, Inc., dated November 1, 2020.

K. "BelGioioso" means BelGioioso Cheese, Inc., a Wisconsin corporation with its headquarters in Green Bay, Wisconsin, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

L. "Divestiture Assets" means the Athenos Divestiture Assets and the Polly-O Divestiture Assets.

M. "Emmi Roth" means Emmi Roth USA, Inc., a Wisconsin corporation with its headquarters in Fitchburg, Wisconsin, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

N. "Including" means including, but not limited to.

O. "Kraft Heinz" means Defendant The Kraft Heinz Company, a Delaware corporation with its co-headquarters in Pittsburgh, Pennsylvania and Chicago, Illinois, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

P. "Lactalis" means Defendant B.S.A. S.A., a French corporation with its headquarters in Laval, France, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

Q. "LAG Holding" means Defendant LAG Holding, Inc., a wholly-owned subsidiary of Lactalis and a Delaware corporation with its headquarters in Buffalo, New

York, its successors and assigns, and its subsidiaries, including Lactalis American Group, Inc., divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

R. "Polly-O Brand Name" means Polly-O and any other name that uses, incorporates, or references the Polly-O name.

S. "Polly-O Divestiture Assets" means all of Defendants' rights, titles, and interests in and to all property and assets, tangible and intangible, wherever located, relating to or used in connection with the Polly-O Divestiture Business, including:

1. the Polly-O Brand Name, including (a) the right to the exclusive use of the Polly-O Brand Name in all sales channels (including the retail, foodservice, and ingredients or industrial channels), and (b) all other intellectual property owned, licensed, or sublicensed, either as licensor or licensee, including (i) patents, patent applications, and inventions and discoveries that may be patentable, (ii) registered and unregistered copyrights and copyright applications, and (iii) registered and unregistered trademarks, trade dress, service marks, trade names, and trademark applications;

2. the Shared Recipes License;

3. all contracts, contractual rights, and customer relationships, and all other agreements, commitments, and understandings, including agreements with suppliers, manufacturers, co-packers, and retailers, teaming agreements, leases, and all outstanding offers or solicitations to enter into a similar arrangement;

4. all licenses, permits, certifications, approvals, consents, registrations, waivers, and authorizations, including those issued or granted by any governmental organization, and all pending applications or renewals;

5. all records and data, including (a) customer lists, accounts, sales, and credits records, (b) production, repair, maintenance, and performance records, (c) manuals and technical information Defendants provide to their own employees,

customers, suppliers, agents, or licensees, (d) records and research data concerning historic and current research and development activities, including designs of experiments and the results of successful and unsuccessful designs and experiments, and (e) drawings, blueprints, and designs; and

6. all other intangible property, including (a) commercial names and d/b/a names, (b) technical information, (c) computer software and related documentation, know-how, trade secrets, design protocols, specifications for materials, specifications for parts, specifications for devices, safety procedures (e.g., for the handling of materials and substances), quality assurance and control procedures, (d) design tools and simulation capabilities, and (e) rights in internet web sites and internet domain names.

*Provided, however*, that the assets specified in Paragraphs II.S.1–6 above do not include any ownership of the intellectual property licensed through the Shared Recipes License or the Polly-O Excluded Contracts.

T. "Polly-O Divestiture Business" means the worldwide business of the sale of Polly-O Products by Kraft Heinz.

U. "Polly-O Excluded Contracts" means the contracts and agreements between Kraft Heinz and each of the following: (a) Foremost Farms USA Cooperative, dated October 8, 2020; (b) Marathon Cheese Corporation, dated April 10, 2021, and supplemented on April 10, 2021; (c) Saputo Cheese USA Inc., dated November 1, 2020; (d) Amcor Flexibles North America, Inc. (fka Bemis Company, Inc.), dated January 1, 2015, entered into initially between H.J. Heinz Supply Chain Europe B.V. and Bemis Company, Inc., and last amended November 1, 2020; (e) International Paper Company, dated January 1, 2016, and last amended December 31, 2020; (f) Berry Global, Inc., dated April 1, 2014, supplemented September 22, 2014, and last amended August 1, 2019; (g) Transcontinental US LLC, dated January 1, 2019; and (h) J. Rettenmaier USA LP, dated January 1, 2021.

V. "Polly-O Personnel" means all full-time, part-time, or contract employees of Kraft Heinz, wherever located, whose job responsibilities relate in any way to the Polly-O Divestiture Assets, at any time between September 15, 2020, and the date on which the Polly-O Divestiture Assets are divested. The United States, in its sole discretion, will resolve any disagreement relating to which employees are Polly-O Personnel.

W. "Polly-O Products" means any product that Kraft Heinz sold, sells, or has plans to sell under the Polly-O Brand Name anywhere in the world.

X. "Shared Recipes License" means a perpetual, royalty-free, paid-up, irrevocable, worldwide, non-exclusive license to the formulas, recipes and related trade secrets, know-how, confidential business information and related data that, on or prior to the date of the signing of the Asset Preservation and Hold Separate Stipulation and Order by Defendants, were used by Kraft Heinz for the production of cheese sold under both (i) the Polly-O Brand Name and (ii) any name other than the Polly-O Brand Name.

Y. "Transaction" means the definitive agreement that Lactalis and Kraft Heinz entered into on September 15, 2020, for the acquisition by Lactalis of, among other assets, Kraft Heinz's natural, grated, cultured, and specialty cheese businesses in the United States.

## III. APPLICABILITY

A. This Final Judgment applies to Lactalis, LAG Holding, and Kraft Heinz, as defined above, and all other persons in active concert or participation with any Defendant who receive actual notice of this Final Judgment.

B. If, prior to complying with Section IV, Section V, and Section VI of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of business units that include any of the Divestiture Assets, Defendants must

require any purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from Acquirers.

## IV. DIVESTITURE OF THE ATHENOS DIVESTITURE ASSETS

A. Defendants are ordered and directed, within 30 calendar days after the Court's entry of the Asset Preservation and Hold Separate Stipulation and Order in this matter, to divest the Athenos Divestiture Assets in a manner consistent with this Final Judgment to Emmi Roth or another Acquirer acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed 60 calendar days in total and will notify the Court of any extensions.

B. Defendants must use best efforts to divest the Athenos Divestiture Assets as expeditiously as possible. Defendants must take no action that would jeopardize the completion of the divestiture ordered by the Court, including any action to impede the permitting, operation, or divestiture of the Athenos Divestiture Assets.

C. Unless the United States otherwise consents in writing, divestiture pursuant to this Final Judgment must include the entire Athenos Divestiture Assets and must be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Athenos Divestiture Assets can and will be used by Acquirer of the Athenos Divestiture Assets as part of a viable, ongoing business of selling feta cheese to retailers and that the divestiture to Acquirer of the Athenos Divestiture Assets will remedy the competitive harm in the market for selling feta cheese to retailers alleged in the Complaint.

D. The divestiture of the Athenos Divestiture Assets must be made to an Acquirer that, in the United States' sole judgment, has the intent and capability, including the necessary managerial, operational, technical, and financial capability, to compete effectively in the sale of feta cheese to retailers.

E. The divestiture of the Athenos Divestiture Assets must be accomplished in a manner that satisfies the United States, in its sole discretion, that none of the terms of any agreement between Acquirer of the Athenos Divestiture Assets and Defendants gives Defendants the ability unreasonably to raise costs for Acquirer of the Athenos Divestiture Assets, to lower the efficiency of Acquirer of the Athenos Divestiture Assets, or otherwise interfere in the ability of Acquirer of the Athenos Divestiture Assets to compete effectively in the sale of feta cheese to retailers.

F. In the event Defendants are attempting to divest the Athenos Divestiture Assets to an Acquirer other than Emmi Roth, Defendants promptly must make known, by usual and customary means, the availability of the Athenos Divestiture Assets. Defendants must inform any person making an inquiry relating to a possible purchase of the Athenos Divestiture Assets that the Athenos Divestiture Assets are being divested in accordance with this Final Judgment and must provide that person with a copy of this Final Judgment. Defendants must offer to furnish to all prospective Acquirers of the Athenos Divestiture Assets, subject to customary confidentiality assurances, all information and documents relating to the Athenos Divestiture Assets that are customarily provided in a due diligence process; *provided, however,* that Defendants need not provide information or documents subject to the attorney-client privilege or work-product doctrine. Defendants must make all information and documents available to the United States at the same time that the information and documents are made available to any other person.

G. Defendants must provide prospective Acquirers of the Athenos Divestiture Assets with (1) access to make inspections of the Athenos Divestiture Assets; (2) access to all environmental, zoning, and other permitting documents and information relating to the Athenos Divestiture Assets; and (3) access to all financial, operational, or other documents and information relating to the Athenos Divestiture Assets that would

customarily be provided as part of a due diligence process. Defendants also must disclose all encumbrances on any part of the Athenos Divestiture Assets, including on intangible property.

H. Defendants must cooperate with and assist Acquirer of the Athenos Divestiture Assets in identifying and, at the option of Acquirer of the Athenos Divestiture Assets, in hiring all Athenos Personnel, including:

1. Within 10 business days following the filing of the Complaint in this matter, Defendants must identify all Athenos Personnel to Acquirer of the Athenos Divestiture Assets and the United States, including by providing organization charts covering all Athenos Personnel.

2. Within 10 business days following receipt of a request by Acquirer of the Athenos Divestiture Assets or the United States, Defendants must provide to Acquirer of the Athenos Divestiture Assets and the United States additional information relating to Athenos Personnel, including name, job title, reporting relationships, past experience, responsibilities, training and educational histories, relevant certifications, and job performance evaluations. Defendants must also provide to Acquirer of the Athenos Divestiture Assets and the United States information relating to current and accrued compensation and benefits of Athenos Personnel, including most recent bonuses paid, aggregate annual compensation, current target or guaranteed bonus, if any, any retention agreement or incentives, and any other payments due, compensation or benefits accrued, or promises made to the Athenos Personnel. If Defendants are barred by any applicable law from providing any of this information, Defendants must provide, within 10 business days following receipt of the request, the requested information to the full extent permitted by law and also must provide a written explanation of Defendants' inability to provide the remaining information, including specifically identifying the provisions of the applicable laws.

3. At the request of Acquirer of the Athenos Divestiture Assets, Defendants must promptly make Athenos Personnel available for private interviews with Acquirer of the Athenos Divestiture Assets during normal business hours at a mutually agreeable location.

4. Defendants must not interfere with any effort by Acquirer of the Athenos Divestiture Assets to employ any Athenos Personnel. Interference includes offering to increase the compensation or improve the benefits of Athenos Personnel unless (a) the offer is part of a company-wide increase in compensation or improvement in benefits that was announced prior to September 15, 2020, or (b) the offer is approved by the United States in its sole discretion. Defendants' obligations under this Paragraph will expire six months after the date on which the Athenos Divestiture Assets are divested.

5. For Athenos Personnel who elect employment with Acquirer of the Athenos Divestiture Assets either (a) before the date on which a transition services contract entered into pursuant to Paragraph IV.P is terminated or expires, or (b) within three months after the date on which such a contract is terminated or expires, Defendants must waive all non-compete and non-disclosure agreements; vest and pay to the Athenos Personnel (or to Acquirer of the Athenos Divestiture Assets for payment to the employee) on a prorated basis any bonuses, incentives, other salary, benefits, or other compensation fully or partially accrued at the time of the transfer of the employee to Acquirer of the Athenos Divestiture Assets; vest any unvested pension and other equity rights; and provide all other benefits that those Athenos Personnel otherwise would have been provided had the Athenos Personnel continued employment with Defendants, including any retention bonuses or payments. Defendants may maintain reasonable restrictions on disclosure by Athenos Personnel of Defendants' proprietary non-public information that

is unrelated to the Athenos Divestiture Assets and not otherwise required to be disclosed by this Final Judgment.

6. For a period of 12 months from the date on which the Athenos Divestiture Assets are divested, Defendants may not solicit to rehire Athenos Personnel who were hired by Acquirer of the Athenos Divestiture Assets either (a) before the date on which a transition services contract entered into pursuant to Paragraph IV.P is terminated or expires, or (b) within three months after the date on which such a contract is terminated or expires, unless an individual is terminated or laid off by Acquirer of the Athenos Divestiture Assets or Acquirer of the Athenos Divestiture Assets agrees in writing that Defendants may solicit to re-hire that individual. Nothing in this Paragraph prohibits Defendants from advertising employment openings using general solicitations or advertisements and re-hiring Athenos Personnel who apply for an employment opening through a general solicitation or advertisement.

I. Defendants must warrant to Acquirer of the Athenos Divestiture Assets that (1) the Athenos Divestiture Assets will be operational and without material defect on the date of their transfer to Acquirer of the Athenos Divestiture Assets; (2) there are no material defects in the environmental, zoning, or other permits relating to the operation of the Athenos Divestiture Assets; and (3) Defendants have disclosed all encumbrances on any part of the Athenos Divestiture Assets, including on intangible property. Following the sale of the Athenos Divestiture Assets, Defendants must not undertake, directly or indirectly, challenges to the environmental, zoning, or other permits relating to the operation of the Athenos Divestiture Assets.

J. Defendants must assign, subcontract, or otherwise transfer all contracts, agreements, and customer relationships (or portions of such contracts, agreements, and customer relationships) included in the Athenos Divestiture Assets, including all supply and sales contracts and co-packing and packaging supplier agreements, to Acquirer of the

Athenos Divestiture Assets; *provided, however,* that for any contract or agreement that requires the consent of another party to assign, subcontract, or otherwise transfer, Defendants must use best efforts to accomplish the assignment, subcontracting, or transfer. Defendants must not interfere with any negotiations between Acquirer of the Athenos Divestiture Assets and a contracting party.

K. Defendants must, at the option of the Acquirer of the Athenos Divestiture Assets, and subject to the approval by the United States in its sole discretion, assign, subcontract, or otherwise transfer any of the Athenos Transitional Services Contracts to Acquirer of the Athenos Divestiture Assets upon request of the Acquirer of the Athenos Divestiture Assets either at the time of the divestiture of the Athenos Divestiture Assets or at any time prior to the expiration or termination of a transition services contract entered into pursuant to Paragraph IV.P; *provided, however,* that for any contract or agreement that requires the consent of another party to assign, subcontract, or otherwise transfer, Defendants must use best efforts to accomplish the assignment, subcontracting, or transfer. Defendants must not interfere with any negotiations between Acquirer of the Athenos Divestiture Assets and a contracting party.

L. Defendants must use best efforts to assist Acquirer of the Athenos Divestiture Assets to obtain all necessary licenses, registrations, and permits to operate the Athenos Divestiture Business. Until Acquirer of the Athenos Divestiture Assets obtains the necessary licenses, registrations, and permits, Defendants must provide Acquirer of the Athenos Divestiture Assets with the benefit of Defendants' licenses, registrations, and permits to the full extent permissible by law.

M. At the option of Acquirer of the Athenos Divestiture Assets, and subject to approval by the United States in its sole discretion, on or before the date on which the Athenos Divestiture Assets are divested, Defendants must enter into a supply contract or contracts for the processing and packaging of Athenos Products sufficient to meet the

needs of Acquirer of the Athenos Divestiture Assets, as determined by Acquirer of the Athenos Divestiture Assets, for a period of up to two years, on terms and conditions reasonably related to market conditions for the processing and packaging of Athenos Products. Any amendment to or modification of any provision of any such supply contract is subject to approval by the United States, in its sole discretion. The United States, in its sole discretion, may approve one or more extensions of any supply contract, for a total of up to an additional 12 months. If Acquirer of the Athenos Divestiture Assets seeks an extension of the term of any supply contract, Defendants must notify the United States in writing at least three months prior to the date the supply contract expires. Acquirer of the Athenos Divestiture Assets may terminate a supply contract, or any portion of a supply contract, without cost or penalty at any time upon commercially reasonable written notice. The employees of Defendants tasked with providing services pursuant to a supply contract must not share any competitively sensitive information of Acquirer of the Athenos Divestiture Assets with any other employee of Defendants.

N. At the option of Acquirer of the Athenos Divestiture Assets, and subject to approval by the United States in its sole discretion, Defendants may, for the sole purpose of fulfilling any supply contract required by Paragraph IV.M of this Final Judgment, retain the Athenos Transitional Manufacturing Assets until the earlier of (1) 60 calendar days after Acquirer of the Athenos Divestiture Assets terminates the supply contract or contracts required by Paragraph IV.M of this Final Judgment or (2) 60 calendar days following the expiration of any supply contract or contracts required by Paragraph IV.M of this Final Judgment, after which Defendants must sell and transfer to Acquirer of the Athenos Divestiture Assets the Athenos Transitional Manufacturing Assets on terms and conditions reasonably related to market conditions for such manufacturing assets.

O. Defendants must warrant to Acquirer of the Athenos Divestiture Assets that (1) the Athenos Transitional Manufacturing Assets will be operational and without

material defect on the date of their transfer to Acquirer of the Athenos Divestiture Assets; (2) there are no material defects in the environmental, zoning, or other permits relating to the operation of the

Athenos Transitional Manufacturing Assets; and (3) Defendants have disclosed all encumbrances on any part of the Athenos Transitional Manufacturing Assets, including on intangible property. Following the sale of the Athenos Transitional Manufacturing Assets, Defendants must not undertake, directly or indirectly, challenges to the environmental, zoning, or other permits relating to the operation of the Athenos Transitional Manufacturing Assets.

P. At the option of Acquirer of the Athenos Divestiture Assets, and subject to approval by the United States in its sole discretion, on or before the date on which the Athenos Divestiture Assets are divested, Defendants must enter into a contract to provide transition services for back office, human resources, accounting, information technology services and support, facilitating repacking, warehousing, transportation, and by making personnel available to assist Acquirer of the Athenos Divestiture Assets for a period of up to six months on terms and conditions reasonably related to market conditions for the provision of the transition services. Any amendment to or modification of any provision of a contract to provide transition services is subject to approval by the United States, in its sole discretion. The United States, in its sole discretion, may approve one or more extensions of any contract for transition services, for a total of up to an additional six months. If Acquirer of the Athenos Divestiture Assets seeks an extension of the term of any contract for transition services, Defendants must notify the United States in writing at least 30 days prior to the date the contract expires. Acquirer of the Athenos Divestiture Assets may terminate a contract for transition services, or any portion of a contract for transition services, without cost or penalty at any time upon commercially reasonable written notice. The employees of Defendants tasked with providing transition services

must not share any competitively sensitive information of Acquirer of the Athenos Divestiture Assets with any other employee of Defendants.

Q. If any term of an agreement between Defendants and Acquirer of the Athenos Divestiture Assets, including an agreement to effectuate the divestiture of the Athenos Divestiture Assets required by this Final Judgment, varies from a term of this Final Judgment, to the extent that Defendants cannot fully comply with both, this Final Judgment determines Defendants' obligations.

## V. DIVESTITURE OF THE POLLY-O DIVESTITURE ASSETS

A. Defendants are ordered and directed, within 30 calendar days after the Court's entry of the Asset Preservation and Hold Separate Stipulation and Order in this matter, to divest the Polly-O Divestiture Assets in a manner consistent with this Final Judgment to BelGioioso or another Acquirer acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed 60 calendar days in total and will notify the Court of any extensions.

B. Defendants must use best efforts to divest the Polly-O Divestiture Assets as expeditiously as possible. Defendants must take no action that would jeopardize the completion of the divestiture ordered by the Court, including any action to impede the permitting, operation, or divestiture of the Polly-O Divestiture Assets.

C. Unless the United States otherwise consents in writing, divestiture pursuant to this Final Judgment must include the entire Polly-O Divestiture Assets and must be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Polly-O Divestiture Assets can and will be used by Acquirer of the Polly-O Divestiture Assets as part of a viable, ongoing business of selling ricotta cheese to retailers, and that the divestiture to Acquirer of the Polly-O Divestiture Assets will

remedy the competitive harm in the market for selling ricotta cheese to retailers alleged in the Complaint.

D. The divestiture of the Polly-O Divestiture Assets must be made to an Acquirer that, in the United States' sole judgment, has the intent and capability, including the necessary managerial, operational, technical, and financial capability, to compete effectively in the sale of ricotta cheese to retailers.

E. The divestiture of the Polly-O Divestiture Assets must be accomplished in a manner that satisfies the United States, in its sole discretion, that none of the terms of any agreement between Acquirer of the Polly-O Divestiture Assets and Defendants gives Defendants the ability unreasonably to raise costs for Acquirer of the Polly-O Divestiture Assets, to lower the efficiency of Acquirer of the Polly-O Divestiture Assets, or otherwise interfere in the ability of Acquirer of the Polly-O Divestiture Assets to compete effectively in the sale of ricotta cheese to retailers.

F. In the event Defendants are attempting to divest the Polly-O Divestiture Assets to an Acquirer other than BelGioioso, Defendants promptly must make known, by usual and customary means, the availability of the Polly-O Divestiture Assets. Defendants must inform any person making an inquiry relating to a possible purchase of the Polly-O Divestiture Assets that the Polly-O Divestiture Assets are being divested in accordance with this Final Judgment and must provide that person with a copy of this Final Judgment. Defendants must offer to furnish to all prospective Acquirers of the Polly-O Divestiture Assets, subject to customary confidentiality assurances, all information and documents relating to the Polly-O Divestiture Assets that are customarily provided in a due diligence process; *provided, however,* that Defendants need not provide information or documents subject to the attorney-client privilege or work-product doctrine. Defendants must make all information and documents available to the United

States at the same time that the information and documents are made available to any other person.

G. Defendants must provide prospective Acquirers of the Polly-O Divestiture Assets with (1) access to make inspections of the Polly-O Divestiture Assets; (2) access to all environmental, zoning, and other permitting documents and information relating to the Polly-O Divestiture Assets; and (3) access to all financial, operational, or other documents and information relating to the Polly-O Divestiture Assets that would customarily be provided as part of a due diligence process. Defendants also must disclose all encumbrances on any part of the Polly-O Divestiture Assets, including on intangible property.

H. Defendants must cooperate with and assist Acquirer of the Polly-O Divestiture Assets in identifying and, at the option of Acquirer of the Polly-O Divestiture Assets, in hiring all Polly-O Personnel, including:

1. Within 10 business days following the filing of the Complaint in this

matter, Defendants must identify all Polly-O Personnel to Acquirer of the Polly-O Divestiture Assets and the United States, including by providing organization charts covering all Polly-O Personnel.

2. Within 10 business days following receipt of a request by Acquirer of the Polly-O Divestiture Assets or the United States, Defendants must provide to Acquirer of the Polly-O Divestiture Assets and the United States additional information relating to Polly-O Personnel, including name, job title, reporting relationships, past experience, responsibilities, training and educational histories, relevant certifications, and job performance evaluations. Defendants must also provide to Acquirer of the Polly-O Divestiture Assets and the United States information relating to current and accrued compensation and benefits of Polly-O Personnel, including most recent bonuses paid,

aggregate annual compensation, current target or guaranteed bonus, if any, any retention agreement or incentives, and any other payments due, compensation or benefits accrued, or promises made to the Polly-O Personnel. If Defendants are barred by any applicable law from providing any of this information, Defendants must provide, within 10 business days following receipt of the request, the requested information to the full extent permitted by law and also must provide a written explanation of Defendants' inability to provide the remaining information, including specifically identifying the provisions of the applicable laws.

3. At the request of Acquirer of the Polly-O Divestiture Assets, Defendants must promptly make Polly-O Personnel available for private interviews with Acquirer of the Polly-O Divestiture Assets during normal business hours at a mutually agreeable location.

4. Defendants must not interfere with any effort by Acquirer of the Polly-O Divestiture Assets to employ any Polly-O Personnel. Interference includes offering to increase the compensation or improve the benefits of Polly-O Personnel unless (a) the offer is part of a company-wide increase in compensation or improvement in benefits that was announced prior to September 15, 2020, or (b) the offer is approved by the United States in its sole discretion. Defendants' obligations under this Paragraph will expire six months after the date on which the Polly-O Divestiture Assets are divested.

5. For Polly-O Personnel who elect employment with Acquirer of the Polly-O Divestiture Assets either (a) before the date on which a transition services contract entered into pursuant to Paragraph V.N is terminated or expires, or (b) within three months after the date on which such a contract is terminated or expires, Defendants must waive all non-compete and non-disclosure agreements; vest and pay to the Polly-O Personnel (or to Acquirer of the Polly-O Divestiture Assets for payment to the employee)

on a prorated basis any bonuses, incentives, other salary, benefits, or other compensation fully or partially accrued at the time of the transfer of the employee to Acquirer of the Polly-O Divestiture Assets; vest any unvested pension and other equity rights; and provide all other benefits that those Polly-O Personnel otherwise would have been provided had the Polly-O Personnel continued employment with Defendants, including any retention bonuses or payments. Defendants may maintain reasonable restrictions on disclosure by Polly-O Personnel of Defendants' proprietary non-public information that is unrelated to the Polly-O Divestiture Assets and not otherwise required to be disclosed by this Final Judgment.

6. For a period of 12 months from the date on which the Polly-O Divestiture Assets are divested, Defendants may not solicit to rehire Polly-O Personnel who were hired by Acquirer of the Polly-O Divestiture Assets either (a) before the date on which a transition services contract entered into pursuant to Paragraph V.N is terminated or expires, or (b) within three months after the date on which such a contract is terminated or expires, unless an individual is terminated or laid off by Acquirer of the Polly-O Divestiture Assets or Acquirer of the Polly-O Divestiture Assets agrees in writing that Defendants may solicit to re-hire that individual. Nothing in this Paragraph prohibits Defendants from advertising employment openings using general solicitations or advertisements and re-hiring Polly-O Personnel who apply for an employment opening through a general solicitation or advertisement.

I. Defendants must warrant to Acquirer of the Polly-O Divestiture Assets that (1) the Polly-O Divestiture Assets will be operational and without material defect on the date of their transfer to Acquirer of the Polly-O Divestiture Assets; (2) there are no material defects in the environmental, zoning, or other permits relating to the operation of the Polly-O Divestiture Assets; and (3) Defendants have disclosed all encumbrances on any part of the Polly-O Divestiture Assets, including on intangible property. Following

the sale of the Polly-O Divestiture Assets, Defendants must not undertake, directly or indirectly, challenges to the environmental, zoning, or other permits relating to the operation of the Polly-O Divestiture Assets.

J. Defendants must assign, subcontract, or otherwise transfer all contracts, agreements, and customer relationships (or portions of such contracts, agreements, and customer relationships) included in the Polly-O Divestiture Assets, including all supply and sales contracts and co-packing and packaging supply agreements, to Acquirer of the Polly-O Divestiture Assets; *provided, however,* that for any contract or agreement that requires the consent of another party to assign, subcontract, or otherwise transfer, Defendants must use best efforts to accomplish the assignment, subcontracting, or transfer. Defendants must not interfere with any negotiations between Acquirer of the Polly-O Divestiture Assets and a contracting party.

K. In the event Defendants are attempting to divest the Polly-O Divestiture Assets to an Acquirer other than BelGioioso, Defendants must, as the option of Acquirer of the Polly-O Divestiture Assets, and subject to the approval by the United States in its sole discretion, assign, subcontract, or otherwise transfer any of the Polly-O Excluded Contracts to Acquirer of the Polly-O Divestiture Assets; *provided, however,* that for any contract or agreement that requires the consent of another party to assign, subcontract, or otherwise transfer, Defendants must use best efforts to accomplish the assignment, subcontracting, or transfer. Defendants must not interfere with any negotiations between Acquirer of the Polly-O Divestiture Assets and a contracting party.

L. Defendants must use best efforts to assist Acquirer of the Polly-O Divestiture Assets to obtain all necessary licenses, registrations, and permits to operate the Polly-O Divestiture Business. Until Acquirer of the Polly-O Divestiture Assets obtains the necessary licenses, registrations, and permits, Defendants must provide

Acquirer of the Polly-O Divestiture Assets with the benefit of Defendants' licenses, registrations, and permits to the full extent permissible by law.

M. At the option of Acquirer of the Polly-O Divestiture Assets, and subject to approval by the United States in its sole discretion, on or before the date on which the Polly-O Divestiture Assets are divested, Defendants must enter into a supply contract or contracts for the production and packaging of Polly-O Products sufficient to meet the needs of Acquirer of the Polly-O Divestiture Assets, as determined by Acquirer of the Polly-O Divestiture Assets, for a period of up to 12 months, on terms and conditions reasonably related to market conditions for the production and packaging of Polly-O Products. Any amendment to or modification of any provision of any such supply contract is subject to approval by the United States, in its sole discretion. The United States, in its sole discretion, may approve one or more extensions of any supply contract, for a total of up to an additional 12 months. If Acquirer of the Polly-O Divestiture Assets seeks an extension of the term of any supply contract, Defendants must notify the United States in writing at least three months prior to the date the supply contract expires. Acquirer of the Polly-O Divestiture Assets may terminate a supply contract, or any portion of a supply contract, without cost or penalty at any time upon commercially reasonable written notice. The employees of Defendants tasked with providing services pursuant to a supply contract must not share any competitively sensitive information of Acquirer of the Polly-O Divestiture Assets with any other employee of Defendants.

N. At the option of Acquirer of the Polly-O Divestiture Assets, and subject to approval by the United States in its sole discretion, on or before the date on which the Polly-O Divestiture Assets are divested, Defendants must enter into a contract to provide transition services for back office, human resources, accounting, information technology services and support, facilitating repacking, warehousing, transportation, and by making personnel available to assist Acquirer of the Polly-O Divestiture Assets for a period of up

to six months on terms and conditions reasonably related to market conditions for the provision of the transition services. Any amendment to or modification of any provision of a contract to provide transition services is subject to approval by the United States, in its sole discretion. The United States, in its sole discretion, may approve one or more extensions of any contract for transition services, for a total of up to an additional six months. If Acquirer of the Polly-O Divestiture Assets seeks an extension of the term of any contract for transition services, Defendants must notify the United States in writing at least 30 days prior to the date the contract expires. Acquirer of the Polly-O Divestiture Assets may terminate a contract for transition services, or any portion of a contract for transition services, without cost or penalty at any time upon commercially reasonable written notice. The employees of Defendants tasked with providing transition services must not share any competitively sensitive information of Acquirer of the Polly-O Divestiture Assets with any other employee of Defendants.

O. If any term of an agreement between Defendants and Acquirer of the Polly-O Divestiture Assets, including an agreement to effectuate the divestiture of the Polly-O Divestiture Assets required by this Final Judgment, varies from a term of this Final Judgment, to the extent that Defendants cannot fully comply with both, this Final Judgment determines Defendants' obligations.

## VI. APPOINTMENT OF DIVESTITURE TRUSTEE

A. If Defendants have not divested all of the Divestiture Assets within the periods specified in Paragraphs IV.A and V.A, Defendants must immediately notify the United States of that fact in writing. Upon application of the United States, which Defendants may not oppose, the Court will appoint a divestiture trustee selected by the United States and approved by the Court to effect the divestiture of any of the Divestiture Assets that have not been sold during the time periods specified in Paragraphs IV.A and V.A.

B. After the appointment of a divestiture trustee by the Court, only the divestiture trustee will have the right to sell those Divestiture Assets that the divestiture trustee has been appointed to sell. The divestiture trustee will have the power and authority to accomplish the divestiture(s) to an Acquirer(s) acceptable to the United States, in its sole discretion, at a price and on terms obtainable through reasonable effort by the divestiture trustee, subject to the provisions of Sections IV, V, VI, and VII of this Final Judgment, and will have other powers as the Court deems appropriate. The divestiture trustee must sell the relevant Divestiture Assets as quickly as possible.

C. Defendants may not object to a sale by the divestiture trustee on any ground other than malfeasance by the divestiture trustee. Objections by Defendants must be conveyed in writing to the United States and the divestiture trustee within 10 calendar days after the divestiture trustee has provided the notice of proposed divestiture required by Section VII.

D. The divestiture trustee will serve at the cost and expense of Defendants pursuant to a written agreement, on terms and conditions, including confidentiality requirements and conflict of interest certifications, approved by the United States in its sole discretion.

E. The divestiture trustee may hire at the cost and expense of Defendants any agents or consultants, including investment bankers, attorneys, and accountants, that are reasonably necessary in the divestiture trustee's judgment to assist with the divestiture trustee's duties. These agents or consultants will be accountable solely to the divestiture trustee and will serve on terms and conditions, including confidentiality requirements and conflict-of-interest certifications, approved by the United States in its sole discretion.

F. The compensation of the divestiture trustee and agents or consultants hired by the divestiture trustee must be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement that provides the divestiture trustee with incentives based

on the price and terms of the divestiture and the speed with which it is accomplished. If the divestiture trustee and Defendants are unable to reach agreement on the divestiture trustee's compensation or other terms and conditions of engagement within 14 calendar days of the appointment of the divestiture trustee by the Court, the United States, in its sole discretion, may take appropriate action, including by making a recommendation to the Court. Within three business days of hiring an agent or consultant, the divestiture trustee must provide written notice of the hiring and rate of compensation to Defendants and the United States.

G. The divestiture trustee must account for all monies derived from the sale of the Divestiture Assets sold by the divestiture trustee and all costs and expenses incurred. Within 30 calendar days of the date on which any divestiture overseen by the divestiture trustee is completed, the divestiture trustee must submit that accounting to the Court for approval. After approval by the Court of the divestiture trustee's accounting, including fees for unpaid services and those of agents or consultants hired by the divestiture trustee, all remaining money must be paid to Defendants and the trust will then be terminated.

H. Defendants must use best efforts to assist the divestiture trustee to accomplish the required divestiture(s). Subject to reasonable protection for trade secrets, other confidential research, development, or commercial information, or any applicable privileges, Defendants must provide the divestiture trustee and agents or consultants retained by the divestiture trustee with full and complete access to all personnel, books, records, and facilities of the relevant Divestiture Assets. Defendants also must provide or develop financial and other information relevant to the Divestiture Assets that the divestiture trustee may reasonably request. Defendants must not take any action to interfere with or to impede the divestiture trustee's accomplishment of the divestiture(s).

I. The divestiture trustee must maintain complete records of all efforts made to sell any of the Divestiture Assets that have not been sold during the time periods specified in Paragraphs IV.A and V.A, including by filing monthly reports with the United States setting forth the divestiture trustee's efforts to accomplish the divestiture(s) ordered by this Final Judgment. The reports must include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring any interest in the Divestiture Assets that the divestiture trustee has been appointed to sell and must describe in detail each contact.

J. If the divestiture trustee has not accomplished the divestiture(s) ordered by this Final Judgment within six months of appointment, the divestiture trustee must promptly provide the United States with a report setting forth: (1) the divestiture trustee's efforts to accomplish the required divestiture(s); (2) the reasons, in the divestiture trustee's judgment, why the required divestiture(s) has not been accomplished; and (3) the divestiture trustee's recommendations for completing the divestiture(s). Following receipt of that report, the United States may make additional recommendations to the Court. The Court thereafter may enter such orders as it deems appropriate to carry out the purpose of this Final Judgment, which may include extending the trust and the term of the divestiture trustee's appointment by a period requested by the United States.

K. The divestiture trustee will serve until divestiture of all Divestiture Assets is completed or for a term otherwise ordered by the Court.

L. If the United States determines that the divestiture trustee is not acting diligently or in a reasonably cost-effective manner, the United States may recommend that the Court appoint a substitute divestiture trustee.

## VII. NOTICE OF PROPOSED DIVESTITURE

A. Within two business days following execution of a definitive agreement to sell the Athenos Divestiture Assets to an Acquirer other than Emmi Roth or execution of a definitive agreement to sell the Polly-O Divestiture Assets to an Acquirer other than BelGioioso, Defendants or the divestiture trustee, whichever is then responsible for effecting the divestiture, must notify the United States of the proposed divestiture. If the divestiture trustee is responsible for completing the divestiture, the divestiture trustee also must notify Defendants. The notice must set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the relevant Divestiture Assets.

B. Within 15 calendar days of receipt by the United States of a notice required by Paragraph VII.A, the United States may request from Defendants, the proposed Acquirer, other third parties, or the divestiture trustee additional information concerning the proposed divestiture, the proposed Acquirer, and other prospective Acquirers. Defendants and the divestiture trustee must furnish the additional information requested within 15 calendar days of the receipt of the request unless the United States provides written agreement to a different period.

C. Within 45 calendar days after receipt of a notice required by Paragraph VII.A or within 20 calendar days after the United States has been provided the additional information requested pursuant to Paragraph VII.B, whichever is later, the United States will provide written notice to Defendants and any divestiture trustee that states whether the United States, in its sole discretion, objects to the proposed Acquirer or any other aspect of the proposed divestiture. Without written notice that the United States does not object, a divestiture may not be consummated. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Paragraph VI.C of this Final

Judgment. Upon objection by Defendants pursuant to Paragraph VI.C, a divestiture by the divestiture trustee may not be consummated unless approved by the Court.

D. No information or documents obtained pursuant to this Section may be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party, including grand jury proceedings, for the purpose of evaluating a proposed Acquirer or securing compliance with this Final Judgment, or as otherwise required by law.

E. In the event of a request by a third party for disclosure of information under the Freedom of Information Act, 5 U.S.C. 552, the United States Department of Justice's Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 CFR part 16, including the provision on confidential commercial information, at 28 CFR 16.7. Persons submitting information to the Antitrust Division should designate the confidential commercial information portions of all applicable documents and information under 28 CFR 16.7. Designations of confidentiality expire 10 years after submission, "unless the submitter requests and provides justification for a longer designation period." *See* 28 CFR 16.7(b).

F. If at the time that a person furnishes information or documents to the United States pursuant to this Section, that person represents and identifies in writing information or documents for which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," the United States must give that person 10 calendar days' notice before divulging the material in any legal proceeding (other than a grand jury proceeding).

## VIII. FINANCING

Defendants may not finance all or any part of any Acquirer's purchase of all or part of the Divestiture Assets.

## IX. ASSET PRESERVATION AND HOLD SEPARATE

Defendants must take all steps necessary to comply with the Asset Preservation and Hold Separate Stipulation and Order entered by the Court.

## X. AFFIDAVITS

A. Within 20 calendar days of the filing of the Complaint in this matter, and every 30 calendar days thereafter until the divestitures required by this Final Judgment have been completed, each Defendant must deliver to the United States an affidavit, signed by (a) on behalf of Kraft Heinz, the Global Chief Financial Officer, and the Global General Counsel, and (b) on behalf of Lactalis, the Chief Financial Officer of LAG Holding, and the Chief Legal Officer of LAG Holding, describing in reasonable detail the fact and manner of that Defendant's compliance with this Final Judgment. The United States, in its sole discretion, may approve different signatories for the affidavits.

B. In the event Defendants are attempting to divest the Athenos Divestiture Assets to an Acquirer other than Emmi Roth or the Polly-O Divestiture Assets to an Acquirer other than BelGioioso, each affidavit required by Paragraph X.A must include: (1) the name, address, and telephone number of each person who, during the preceding 30 calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, an interest in the Divestiture Assets and describe in detail each contact with such persons during that period; (2) a description of the efforts Defendants have taken to solicit buyers for and complete the sale of the Divestiture Assets and to provide required information to prospective Acquirers; and (3) a description of any limitations placed by Defendants on information provided to prospective Acquirers. Objection by the United States to information provided by Defendants to prospective Acquirers must be made within 14

calendar days of receipt of the affidavit, except that the United States may object at any time if the information set forth in the affidavit is not true or complete.

C. Defendants must keep all records of any efforts made to divest the Athenos Divestiture Assets until one year after the Athenos Divestiture Assets are divested. Defendants must keep all records of any efforts made to divest the Polly-O Divestiture Assets until one year after the Polly-O Divestiture Assets are divested.

D. Within 20 calendar days of the filing of the Complaint in this matter, each Defendant must deliver to the United States an affidavit signed by (a) on behalf of Kraft Heinz, the Global Chief Financial Officer, and the Global General Counsel, and (b) on behalf of Lactalis, the Chief Financial Officer of LAG Holding, and the Chief Legal Officer of LAG Holding, that describes in reasonable detail all actions that Defendant has taken and all steps that Defendant has implemented on an ongoing basis to comply with Section IX of this Final Judgment. The United States, in its sole discretion, may approve different signatories for the affidavits.

E. If a Defendant makes any changes to actions and steps described in affidavits provided pursuant to Paragraph X.D, the Defendant must, within 15 calendar days after any change is implemented, deliver to the United States an affidavit describing those changes.

F. Defendants must keep all records of any efforts made to comply with Section IX until the later of one year after the Athenos Divestiture Assets are divested or one year after the Polly-O Divestiture Assets are divested.

## XI. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment or of related orders such as the Asset Preservation and Hold Separate Stipulation and Order or of determining whether this Final Judgment should be modified or vacated, upon written request of an authorized representative of the Assistant Attorney

General for the Antitrust Division, and reasonable notice to Defendants, Defendants must permit, from time to time and subject to legally recognized privileges, authorized representatives, including agents retained by the United States:

1. to have access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, relating to any matters contained in this Final Judgment. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, Defendants must submit written reports or respond to written interrogatories, under oath if requested, relating to any matters contained in this Final Judgment.

C. No information or documents obtained pursuant to this Section may be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party, including grand jury proceedings, for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. In the event of a request by a third party for disclosure of information under the Freedom of Information Act, 5 U.S.C. 552, the Antitrust Division will act in accordance with that statute, and the Department of Justice regulations at 28 CFR part 16, including the provision on confidential commercial information, at 28 CFR 16.7.

Defendants submitting information to the Antitrust Division should designate the confidential commercial information portions of all applicable documents and information under 28 CFR 16.7. Designations of confidentiality expire 10 years after submission, "unless the submitter requests and provides justification for a longer designation period." *See* 28 CFR 16.7(b).

E. If at the time that Defendants furnish information or documents to the United States pursuant to this Section, Defendants represent and identify in writing information or documents for which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," the United States must give Defendants 10 calendar days' notice before divulging the material in any legal proceeding (other than a grand jury proceeding).

## XII. NOTIFICATION

A. Unless a transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the "HSR Act"), Lactalis may not, without first providing at least 30 calendar days advance notification to the United States, directly or indirectly acquire any assets of or any interest, including a financial, security, loan, equity, or management interest, in an entity involved in the sale of ricotta cheese to retailers in the United States during the term of this Final Judgment.

B. Lactalis must provide the notification required by this Section in the same format as, and in accordance with the instructions relating to, the Notification and Report Form set forth in the appendix to part 803 of title 16 of the Code of Federal Regulations, as amended, except that the information requested in Items 5 through 8 of the instructions must be provided only about the sale of ricotta cheese to retailers in the United States.

C. Notification must be provided at least 30 calendar days before acquiring any assets or interest and must include, beyond the information required by the instructions, the names of the principal representatives who negotiated the transaction on behalf of each party, and all management or strategic plans discussing the proposed transaction. If, within the 30 calendar days following notification, representatives of the United States make a written request for additional information, Defendants may not consummate the proposed transaction until 30 calendar days after submitting all requested information.

D. Early termination of the waiting periods set forth in this Section may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section must be broadly construed, and any ambiguity or uncertainty relating to whether to file a notice under this Section must be resolved in favor of filing notice.

## XIII. NO REACQUISITION

Defendants may not reacquire any part of or any interest in the Divestiture Assets during the term of this Final Judgment without prior authorization of the United States.

## XIV. RETENTION OF JURISDICTION

The Court retains jurisdiction to enable any party to this Final Judgment to apply to the Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

## XV. ENFORCEMENT OF FINAL JUDGMENT

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendants agree that in a civil contempt action, a motion to show cause, or a similar

action brought by the United States relating to an alleged violation of this Final Judgment, the United States may establish a violation of this Final Judgment and the appropriateness of a remedy therefor by a preponderance of the evidence, and Defendants waive any argument that a different standard of proof should apply.

B. This Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore the competition the United States alleges was harmed by the challenged conduct. Defendants agree that they may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In an enforcement proceeding in which the Court finds that Defendants have violated this Final Judgment, the United States may apply to the Court for an extension of this Final Judgment, together with other relief that may be appropriate. In connection with a successful effort by the United States to enforce this Final Judgment against a Defendant, whether litigated or resolved before litigation, that Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as all other costs including experts' fees, incurred in connection with that effort to enforce this Final Judgment, including in the investigation of the potential violation.

D. For a period of four years following the expiration of this Final Judgment, if the United States has evidence that a Defendant violated this Final Judgment before it expired, the United States may file an action against that Defendant in this Court requesting that the Court order: (1) Defendant to comply with the terms of this Final Judgment for an additional term of at least four years following the filing of the enforcement action; (2) all appropriate contempt remedies; (3) additional relief needed to

ensure the Defendant complies with the terms of this Final Judgment; and (4) fees or expenses as called for by this Section.

## XVI. EXPIRATION OF FINAL JUDGMENT

Unless the Court grants an extension, this Final Judgment will expire 10 years from the date of its entry, except that after five years from the date of its entry, this Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestitures have been completed and continuation of this Final Judgment is no longer necessary or in the public interest.

## XVII. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including by making available to the public copies of this Final Judgment and the Competitive Impact Statement, public comments thereon, and any response to comments by the United States. Based upon the record before the Court, which includes the Competitive Impact Statement and, if applicable, any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

[Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. 16]

_____
United States District Judge

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA,<br>*Plaintiff*,<br>v.<br>B.S.A. S.A.,<br>LAG HOLDING, INC.,<br>and<br>THE KRAFT HEINZ COMPANY,<br>*Defendants*. | Civil Action No.: 1:21-cv-02976-RBW |

# COMPETITIVE IMPACT STATEMENT

In accordance with the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (the "APPA" or "Tunney Act"), the United States of America files this Competitive Impact Statement related to the proposed Final Judgment filed in this civil antitrust proceeding.

## I. NATURE AND PURPOSE OF THE PROCEEDING

On September 15, 2020, B.S.A. S.A. (collectively with its subsidiaries LAG Holding, Inc., and Lactalis American Group, Inc., "Lactalis") agreed to acquire the natural cheese business of The Kraft Heinz Company ("Kraft Heinz") in the United States, along with its grated cheese business in Canada and its entire cheese business outside North America, for approximately $3.2 billion. The United States filed a civil antitrust Complaint on November 10, 2021, seeking to enjoin the transaction. *See* Dkt. No. 1. The Complaint alleges that the likely effect of this transaction would be to substantially lessen competition for the sale of feta cheese to retailers in the United States and ricotta cheese to retailers in the metropolitan and surrounding area of New York,

New York and in four metropolitan and surrounding areas in Florida in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

At the same time the Complaint was filed, the United States filed an Asset Preservation and Hold Separate Stipulation and Order ("Stipulation and Order") and a proposed Final Judgment, which are designed to remedy the loss of competition alleged in the Complaint. *See* Dkt. Nos. 2-1 and 2-2.

Under the proposed Final Judgment, explained more fully below, Defendants are required to divest Kraft Heinz's entire Athenos and Polly-O businesses, including the brand names, all products sold under those brand names, and other assets related to or used in these businesses to Emmi Roth USA, Inc. and BelGioioso Cheese, Inc., respectively, or to alternative acquirers acceptable to the United States, within 30 calendar days after entry of the Stipulation and Order. These divestitures will protect competition by enabling the acquirers of the Athenos and Polly-O businesses to step into the shoes of Kraft Heinz and compete with Lactalis in the feta and ricotta markets.

Under the terms of the Stipulation and Order, Defendants must also take certain steps to operate, preserve, and maintain the full economic viability, marketability, and competitiveness of the Athenos Divestiture Assets and the Polly-O Divestiture Assets. In addition, Lactalis must hold entirely separate, distinct, and apart from its other operations, the management, sales, and operations of the Athenos Divestiture Assets and the Polly-O Divestiture Assets. The purpose of these terms in the Stipulation and Order is to ensure that competition is maintained while the divestitures are being accomplished. The Court signed the Stipulation and Order on November 13, 2021, and entered the Stipulation and Order on November 15, 2021. *See* Dkt. No. 3.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment by the Court will terminate this action, except that the Court will retain

jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

## II. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATIONS

### A. The Defendants and the Transaction

B.S.A. S.A. is a French company operating under the name Lactalis Group, organized and existing under the laws of France, with its headquarters in Laval, France. It is one of the largest dairy companies in the world, selling cheese in the United States through its subsidiaries, LAG Holding, Inc. and Lactalis American Group, Inc. LAG Holding, Inc., a Delaware corporation with its headquarters in Buffalo, New York, and Lactalis American Group, Inc. generated natural cheese sales of approximately $429 million at retail outlets in the United States in 2020. In the United States, Lactalis sells natural cheeses primarily under the Galbani and Président brand names.

Kraft Heinz is a Delaware corporation co-headquartered in Pittsburgh, Pennsylvania and Chicago, Illinois. Kraft Heinz is one of the largest food products and beverage companies in the world. It is the largest supplier of natural cheeses to grocery stores and other retail outlets in the United States, with retail sales of its natural cheeses totaling over $2.2 billion in 2020. Kraft Heinz sells natural cheeses primarily under the Kraft, Cracker Barrel, Athenos, and Polly-O brand names.

Pursuant to a September 15, 2020 asset purchase agreement, Lactalis will acquire for approximately $3.2 billion Kraft Heinz's interests in its: (1) natural cheese business in the United States, which includes feta, ricotta, and many other types of cheeses; (2) grated cheese business in Canada; and (3) entire cheese business outside North America (the "Transaction"). Kraft Heinz is retaining a significant portion of its cheese business in the United States, consisting of its processed cheese and cream cheese businesses,

marketed under the Kraft Singles, Velveeta, Cheez Whiz, and Philadelphia Cream Cheese brand names.

### B. The Competitive Effects of the Transaction

The Complaint alleges that the Transaction will result in anticompetitive effects in the markets for the sale of feta cheese to retailers in the United States and the sale of ricotta cheese to retailers in the metropolitan and surrounding area of New York, New York (the "New York Metro Market") and in four metropolitan and surrounding areas in Florida: Miami/Ft. Lauderdale, Tampa/St. Petersburg, Orlando, and Jacksonville (collectively, the "Florida Metro Markets").

Cheeses are sold to retailers (such as grocery stores, supermarkets, mass merchandisers like Wal-Mart, and club stores like Sam's Club) as branded cheeses or private label cheeses. A branded cheese bears a brand name controlled by the cheese supplier (*e.g.*, Kraft Heinz's Athenos and Polly-O brands) and is usually carried by multiple retailers. A private label cheese is usually sold under a name owned by the retailer (*e.g.*, Wal-Mart's Great Value private label), and is typically offered only in that retailer's stores. Grocery stores and other food retailers act as proxies for individual customers and seek to offer a variety of products demanded by their customers. Accordingly, retailers strive to carry products and brands that their customers value, and may vary their offerings to meet local customer demand.

The Transaction would combine the two largest suppliers of feta cheese sold to retailers in the United States and the two largest suppliers of ricotta cheese sold to retailers in the New York Metro Market and in each of the Florida Metro Markets. As alleged in the Complaint, eliminating the head-to-head competition between Lactalis and Kraft Heinz would likely lead to higher prices, lower quality, and less innovation for these products for retailers (and consumers) in the relevant markets.

#### 1. Relevant Product Markets

A typical starting point for merger analysis is defining a relevant market, which has both a product and a geographic dimension. Courts define relevant markets to help determine the areas of competition most likely to be affected by a merger.

**a. Feta Cheese Sold to Retailers**

As alleged in the Complaint, feta cheese sold to retailers is a relevant antitrust product market in which to analyze the effects of the Transaction. Feta cheese originated in Greece, and is primarily used as an ingredient in food dishes. There are no reasonable substitutes for feta cheese for most consumers. A hypothetical monopolist supplier of feta cheese to retailers likely would find it profitable to increase its prices by at least a small but significant non-transitory amount (*e.g.*, five percent). Consumers are unlikely to sufficiently reduce their purchases of feta cheese or shift to a different cheese or other products to render such a price increase unprofitable. Retailers, buying on behalf of consumers, are also unlikely to sufficiently reduce purchases of feta cheese to render such a price increase unprofitable. Accordingly, feta cheese sold to retailers is a relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. 18.

Defining a market for feta cheese that is sold to retailers is also consistent with industry recognition and practice. As the Complaint indicates, suppliers of feta cheese to retailers typically (1) monitor the retail prices of competing feta cheeses and set their prices and promotional spending accordingly, (2) do not set the price they charge for feta cheese based on the prices of other cheeses or other consumer products, (3) track their sales to retailers separately from their sales to other distribution channels (*i.e.*, foodservice and the ingredients or industrial channels), (4) have sales employees dedicated to serving retailers, and (5) sell feta cheese to retailers in packaging and package sizes that are different than that used for feta cheese sold through other distribution channels. These factors further support that feta cheese sold to retailers is a

relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. 18.

**b. Ricotta Cheese Sold to Retailers**

As alleged in the Complaint, ricotta cheese sold to retailers is a relevant antitrust product market in which to analyze the effects of the Transaction. Ricotta is a soft cheese that originated in Italy, and is primarily used as an ingredient in food dishes. There are no reasonable substitutes for ricotta cheese for most consumers. A hypothetical monopolist supplier of ricotta cheese to retailers likely would find it profitable to increase its prices by at least a small but significant non-transitory amount (*e.g.*, five percent). Similar to feta cheese, consumers and retailers are unlikely to sufficiently reduce their purchases of ricotta cheese or shift to a different cheese or other products to render such a price increase unprofitable. In addition, defining a market for ricotta cheese that is sold to retailers is consistent with industry recognition and practice for the same reasons described above for feta cheese. Accordingly, ricotta cheese sold to retailers is a relevant product market and line of commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. 18.

**2. Relevant Geographic Markets**

The relevant geographic markets for analyzing the effects of the Transaction on competition for feta and ricotta cheeses sold to retailers are best defined by reference to the locations of the retailers that purchase feta and ricotta cheeses in order to then sell those products to consumers. This approach to defining the relevant geographic markets is appropriate because suppliers of feta and ricotta cheeses to retailers assess the competitive conditions in particular localities, including local demand for feta and ricotta cheeses, as well as local demand for the suppliers' own brands as compared to competing brands and to private label offerings. As a result, suppliers of feta and ricotta cheeses can charge different prices, or offer different levels of promotional funding, to retailers in

different locations based on local competitive conditions. If targeted for a price increase or reduction in promotional funding, retailers in a given locality would likely not be able to render such conduct unprofitable by purchasing feta or ricotta cheeses outside of the relevant geography and transporting it to their retail locations.

As the Complaint alleges, where feta and ricotta cheese suppliers can successfully vary prices and promotional funding based on retailer customer location, the goal of geographic market definition is to identify the area encompassing the location of potentially targeted customers. The relevant geographic markets described below encompass the locations of retailers that would likely be targeted by suppliers for price increases as a result of the Transaction.

**a. The Relevant Geographic Markets for Feta Cheese Sold to Retailers**

The relevant geographic market for the sale of feta cheese to retailers may be defined as narrowly as individual metropolitan and surrounding areas. A hypothetical monopolist supplier of feta cheese to retailers in any given metropolitan and surrounding area in the United States likely would find it profitable to increase its prices by at least a small but significant and non-transitory amount (*e.g.*, five percent). Therefore, each metropolitan and surrounding area in the United States is a relevant geographic market and section of the country within the meaning of Section 7 of the Clayton Act, 15 U.S.C. 18.

As the Complaint alleges, in circumstances where competitive conditions are similar, it is appropriate to aggregate local markets into a larger relevant market for analytical convenience. The competitive conditions across the country are similar for the sale of feta cheese to retailers. Kraft Heinz's Athenos feta and Lactalis's Président feta are the two top-selling feta cheese brands in the United States. While some regional brands of feta cheese exist, none place a significant competitive constraint on Defendants in any particular metropolitan and surrounding area. Therefore, it is appropriate to

analyze competition for the sale of feta cheese to retailers on a national basis.

#### b. The Relevant Geographic Markets for Ricotta Cheese Sold to Retailers

The relevant geographic markets for the sale of ricotta cheese to retailers are the New York Metro Market and each of the Florida Metro Markets. In each of these markets, Defendants compete vigorously with each other for sales of ricotta cheese to retailers. A hypothetical monopolist supplier of ricotta cheese to retailers in the New York Metro Market and in each of the Florida Metro Markets likely would increase its price by at least a small but significant and non-transitory amount (*e.g.*, five percent). Therefore, the New York Metro Market and each of the Florida Metro Markets are relevant geographic markets and sections of the country within the meaning of Section 7 of the Clayton Act, 15 U.S.C. 18.

### 3. The Transaction Would Result in Large Combined Market Shares and Likely Substantially Lessen Head-to-Head Competition Between Two Particularly Close Competitors

The Transaction would combine Lactalis and Kraft Heinz, the two largest suppliers of feta cheese to retailers nationally, and the two largest suppliers of ricotta cheese to retailers in the New York Metro Market and in each of the Florida Metro Markets, resulting in a substantial increase in concentration in these markets.

The Supreme Court has held that mergers that significantly increase concentration in already concentrated markets are presumptively anticompetitive and therefore presumptively unlawful. To measure market concentration, courts often use the Herfindahl-Hirschman Index ("HHI") as described in the *U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines*. HHIs range from 0 in markets with no concentration to 10,000 in markets where one firm has a 100% market share. According to the *Horizontal Merger Guidelines*, mergers that increase the HHI by more than 200 and result in an HHI above 2,500 in any market are presumed to be

anticompetitive and, therefore, unlawful.

The Complaint alleges that the Transaction is presumptively unlawful for the sale of feta cheese to retailers nationally. Defendants are the two largest suppliers of feta cheese to retailers in the United States, and their Athenos and Président feta cheese brands combined would account for approximately 65% of all feta cheese sales by retailers nationally. In a national market for feta cheese sold by retailers, the Transaction would increase the HHI by more than 2,100 points, resulting in a highly concentrated market with a post-acquisition HHI of more than 4,300 points. Thus, the Transaction is presumptively unlawful for the sale of feta cheese to retailers nationally.

As alleged in the Complaint, the Transaction is also presumptively unlawful for the sale of ricotta cheese to retailers in the New York Metro Market and in each of the Florida Metro Markets. In each of these markets, the Defendants are the two largest suppliers of ricotta cheese to retailers. In the New York Metro Market, their Polly-O and Galbani ricotta cheese brands combined would account for approximately 70% of all ricotta cheese sales by retailers, and the Transaction would increase the HHI by more than 2,400 points, resulting in a highly concentrated market with a post-acquisition HHI of more than 5,000 points. In each of the Florida Metro Markets, the Defendants' Polly-O and Galbani ricotta cheese brands combined would account for over 65% of all ricotta cheese sales by retailers, and the Transaction would increase the HHI by more than 1,500 points, resulting in highly concentrated markets, each with a post-acquisition HHI of more than 4,400 points. Thus, the Transaction is presumptively unlawful in the New York Metro Market and in each of the Florida Metro Markets.

The Complaint further alleges that Lactalis and Kraft Heinz are particularly close competitors for feta cheese sold to retailers nationally, and for ricotta cheese sold to retailers in the New York Metro Market and in each of the Florida Metro Markets. The Defendants are the only two major brands for feta and ricotta cheese in the relevant

geographic markets and compete aggressively with each other on pricing and promotions. The Defendants also compete to offer new and innovative products and features, such as Kraft Heinz's flip top container for Athenos crumbled feta cheese and Lactalis's double cream ricotta cheese. Accordingly, the proposed combination of Lactalis and Kraft Heinz would likely lead to higher prices, lower quality, and less innovation for feta cheese sold to retailers nationally and for ricotta cheese sold to retailers in the New York Metro Market and in each of the Florida Metro Markets.

#### 4. Difficulty of Entry or Expansion

As alleged in the Complaint, new entry and expansion by competitors will likely neither be timely nor sufficient in scope to prevent the likely anticompetitive effects of the Transaction. Barriers to entry and expansion are high and include the substantial time and expense required to build a brand's reputation and overcome existing consumer preferences through promotional and advertising activity as well as the substantial sunk costs needed to secure the distribution and placement of a new entrant's products in retail outlets (*e.g.*, paying slotting fees to obtain shelf space at supermarkets and other food retailers).

The Complaint also alleges that the likely anticompetitive effects of the Transaction are not likely to be reversed or outweighed by any efficiencies that the Transaction may achieve.

## III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

To remedy the likely anticompetitive effects of the Transaction, the United States required the Defendants to divest Kraft Heinz's competing feta cheese business (the Athenos Divestiture Business), and its competing ricotta cheese business (the Polly-O Divestiture Business) to acquirers who will step into the shoes of Kraft Heinz and preserve the competition with Lactalis in the relevant geographic markets. Thus, the relief required by the proposed Final Judgment will remedy the loss of competition

alleged in the Complaint by establishing independent and economically viable competitors in the markets for the sale of feta cheese nationally and for the sale of ricotta cheese in the New York Metro Market and in each of the Florida Metro Markets.

### A. Athenos Divestiture Provisions

Paragraph IV.A of the proposed Final Judgment requires Defendants, within 30 days after the entry of the Stipulation and Order by the Court, to divest the Athenos Divestiture Assets to Emmi Roth USA, Inc. ("Emmi Roth") or an alternative acquirer acceptable to the United States, in its sole discretion. Emmi Roth is an established cheese producer based in Fitchburg, Wisconsin. With the divestiture of Kraft Heinz's Athenos business, Emmi Roth, or an alternative qualified acquirer, will be able to enter or expand feta cheese sales to grocery stores and other retailers across the United States. The United States, in its sole discretion, may agree to one or more extensions of the time period to complete the divestiture of the Athenos Divestiture Assets, not to exceed 60 calendar days in total, and will notify the Court of any extensions. Paragraph IV.C of the proposed Final Judgment requires that the divestiture must include the entire Athenos Divestiture Assets and that the assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the assets can and will be operated by the acquirer as a viable, ongoing business that can compete effectively in the sale of feta cheese to retailers. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and must cooperate with any acquirer.

The Athenos Divestiture Assets are defined in Paragraph II.E of the proposed Final Judgment as all rights, titles, and interests in and to all tangible and intangible property and assets relating to or used in connection with the Athenos Divestiture

Business.[1] These assets include: (1) the Athenos Brand Name,[2] including the exclusive right to the name in all sales channels (including the retail, foodservice, and ingredients or industrial channels), and all other intellectual property owned, licensed, or sublicensed, including patents, patent applications, and inventions or discoveries that may be patentable, registered and unregistered copyrights and copyright applications, and registered and unregistered trademarks, trade dress, service marks, trade names, and trademark applications; (2) all contracts, contractual rights, and customer relationships, and all other agreements, commitments, and understandings, including agreements with suppliers, manufacturers, co-packers, and retailers, teaming agreements, leases, and all outstanding offers or solicitations to enter into a similar arrangement; (3) all licenses, permits, certifications, approvals, consents, registrations, waivers, and authorizations, and all pending applications or renewals; (4) all records and data, including customer lists, accounts, sales, and credit records; production, repair, maintenance, and performance records; manuals and technical information Defendants provide to their own employees, customers, suppliers, agents, or licensees; records and research data concerning historic and current research and development activities; and drawings, blueprints, and designs; and (5) all other intangible property, including commercial names and d/b/a names, technical information such as recipes and formulas, computer software and related documentation, know-how, trade secrets, design protocols, specifications for materials, parts, and devices, procedures for safety, quality assurance, and control, design tools and simulation capabilities, and rights in internet websites and domain names.

Importantly, the Athenos Divestiture Assets include all rights to the Athenos Brand Name, which is currently used to sell feta, gorgonzola, blue cheese, hummus, and

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[1] The Athenos Divestiture Business is defined in Paragraph II.F of the proposed Final Judgment as "the worldwide business of the sale of Athenos Products by Kraft Heinz." Athenos Products is defined in Paragraph II.H of the proposed Final Judgment as "any product that Kraft Heinz sold, sells, or has plans to sell under the Athenos Brand Name anywhere in the world."

[2] The Athenos Brand Name is defined in Paragraph II.D of the proposed Final Judgment as "Athenos and any other name that uses, incorporates, or references the Athenos name."

pita chips. By requiring the full divestiture of the Athenos Brand Name, which will allow the acquirer to use the Athenos Brand Name for more than just feta, the proposed Final Judgment will enable the acquirer to more effectively compete in the sale of feta cheese by (1) avoiding the potential consumer confusion and potential harm to the Athenos Brand Name that could result from having both the acquirer and Lactalis marketing and selling Athenos-branded products, and (2) by giving the acquirer control over the sale of all Athenos Products in all three channels of distribution – retail, foodservice, and ingredients or industrial.[3] In this case, it is appropriate to require a divestiture that is broader than the harm alleged in the Complaint in order to preserve competition. *See, e.g.*, *Merger Remedies Manual*, Antitrust Division, September 2020, at 9 (explaining that the Division "may seek to include a full line of products in the divestiture package, even when the antitrust concern relates to only a subset of those products"). The divestiture of the entire Athenos Brand Name (and the entire Athenos Divestiture Business) will allow the divestiture buyer the opportunity to use the divested brand in the same way that Kraft Heinz uses it to compete today.

In addition to the Athenos Divestiture Assets, at a later date, the acquirer will acquire additional physical assets and contracts relating to Athenos feta cheese. These additional assets are referred to as Athenos Transitional Manufacturing Assets in Paragraph II.I of the proposed Final Judgment and defined as: (1) production lines numbers 25 and 26 that are used by the Athenos Divestiture Business for crumbling and packaging feta cheese and are located at Kraft Heinz's facility in Wausau, Wisconsin; (2) the feta cheese packaging mold used to produce plastic feta lids and containers that was purchased by Kraft Heinz in 2021 and is located at the facilities of packaging supplier

[3] The retail channel is comprised of grocery stores, supermarkets, mass merchandisers like Wal-Mart, and club stores like Sam's Club; the foodservice channel is for distributors that sell to restaurants, cafeterias, hospitals, and other businesses that prepare and serve food; and the ingredients/industrial channel is for companies that primarily prepare and package the frozen entrées that are sold in grocery stores and supermarkets.

RPC Bramlage-WIKO USA, Inc. in Morgantown, Pennsylvania; and (3) contracts and agreements between Kraft Heinz and Agropur, J. Rettenmaier USA LP, International Paper Company, Berry Global, Inc., Weber Packaging Solutions, Inc., and Bramlage, Inc.

Because the Athenos Transitional Manufacturing Assets will be used by Defendants to fulfill their obligations under the supply contract permitted by Paragraph IV.M of the proposed Final Judgment, Lactalis is permitted, pursuant to Paragraph IV.N of the proposed Final Judgment, to retain these Athenos Transitional Manufacturing Assets until the supply agreement expires or is terminated. At that point, Defendants are required to sell and transfer to the acquirer of the Athenos Divestiture Assets the Athenos Transitional Manufacturing Assets within 60 days. This is preferable because Lactalis will be responsible for the maintenance and upkeep of the Athenos Transitional Manufacturing Assets for the duration of any supply contract, and pursuant to Paragraph IV.O of the proposed Final Judgment, Lactalis is required to warrant that the Athenos Transitional Manufacturing Assets are operational and without material defect at the time of such transfer to the acquirer.

Similarly, Paragraph IV.K of the proposed Final Judgment provides the acquirer of the Athenos Divestiture Assets with the option to have a series of third-party contracts relating to the production of Athenos Products assigned to it at any time prior to the conclusion of any transition services agreement entered into between the acquirer and Defendants pursuant to Paragraph IV.P of the proposed Final Judgment. These third-party contracts are referred to as the Athenos Transitional Service Contracts in the proposed Final Judgment and are defined in Paragraph II.J as contracts between Kraft Heinz and Prairie Farms, Great Lake Cheese Company, Inc., Marathon Cheese Corporation, Cedar's Mediterranean Foods, Inc., and Saputo Cheese USA, Inc. An acquirer, such as Emmi Roth, that is already a cheese producer with an existing series of suppliers and contracts may prefer not to have some or even any of the Athenos

Transitional Services Contracts assigned to it pursuant to Paragraph IV.K of the proposed Final Judgment, but, for a different acquirer, this option will ensure continuity in supply while also allowing that acquirer to evaluate its needs.

The proposed Final Judgment also contains provisions intended to facilitate the acquirer's efforts to hire employees whose job responsibilities relate to the Athenos Divestiture Assets, enabling the acquirer to successfully operate the Athenos business. Paragraph IV.H of the proposed Final Judgment requires Defendants to provide the acquirer and the United States with organization charts and information relating to these employees and to make them available for interviews with the acquirer. It also prohibits Defendants from interfering with any negotiations by the acquirer to hire these employees. In addition, for employees who elect employment with the acquirer, Defendants must waive all non-compete and non-disclosure agreements; vest and pay on a prorated basis any bonuses, incentives, other salary, benefits, or other compensation fully or partially accrued at the time of transfer; vest any unvested pension and other equity rights; and provide all other benefits that the employees would generally be provided had those employees continued employment with Defendants, including any retention bonuses or payments. Finally, the timeline for when these employees may be hired by the acquirer has been set to ensure that employees providing any transition services pursuant to a transition services agreement entered into pursuant to Paragraph IV.P of the proposed Final Judgment are not interrupted.

Paragraph IV.H of the proposed Final Judgment further provides that Defendants may not directly solicit to rehire any Athenos-related employees who were hired by the acquirer, unless an employee is terminated or laid off by the acquirer or the acquirer agrees in writing that Defendants may solicit to rehire that individual. This non-solicitation period runs for 12 months from the date of the divestiture. This provision serves two purposes. First, it promotes a period of stability that will aid the acquirer in

assuming control of the Athenos business. Second, many food retailers conduct periodic category reviews in which they evaluate their brand offerings and shelf space allocations, and a one-year non-solicitation period will permit the acquirer to complete at least one such category review at most food retailers. It is important to note, however, that this non-solicitation provision does not prohibit Defendants from advertising employment openings using general solicitations or advertisements and rehiring anyone who applies for an opening through a general solicitation or advertisement.

The proposed Final Judgment contains several provisions to facilitate the transition of the Athenos Divestiture Business to the acquirer. First, Paragraph IV.J of the proposed Final Judgment will facilitate the transfer to the acquirer of customer and other contractual relationships that are included within the Athenos Divestiture Assets. Defendants must transfer all contracts, agreements, and customer relationships (or portions of such contracts, agreements, and customer relationships), including all supply and sales contracts and co-packing and packaging supplier agreements, to the acquirer and must use best efforts to assign, subcontract, or otherwise transfer contracts or agreements that require the consent of another party before assignment, subcontracting, or otherwise transferring. Defendants must not interfere with any negotiations between the acquirer of the Athenos Divestiture Assets and a contracting party. These protections also apply to any of the Athenos Transitional Services Contracts that the acquirer can elect to have assigned under Paragraph IV.K of the proposed Final Judgment.

Second, Paragraph IV.M of the proposed Final Judgment requires Defendants, at the acquirer's option, to enter into a supply contract or contracts for the processing and packaging of Athenos Products sufficient to meet the acquirer's needs for a period of up to two years on terms and conditions reasonably related to market conditions for the processing and packaging of Athenos Products. A two-year term is appropriate here to

permit the acquirer to move the physical equipment included in the Athenos Transitional Manufacturing Assets to a facility that will allow for the most efficient operation of the Athenos Divestiture Business. Supply contracts of this nature are common in this industry; indeed, Kraft Heinz today outsources much of its cheese production to other cheese manufacturers, including its feta cheese production. Companies operating in this industry have experience negotiating and managing these types of supply contracts, and such arrangements are used by other natural cheese brands. In addition, Paragraph IV.M of the proposed Final Judgment prohibits employees of the Defendants tasked with providing services pursuant to any supply contract from sharing any competitively sensitive information of the acquirer with any other employee of Defendants.

The acquirer may terminate any supply contract described in Paragraph IV.M of the proposed Final Judgment, or any portion of any such supply contract, without cost or penalty at any time upon commercially reasonable written notice. The United States, in its sole discretion, may approve one or more extensions of any supply contract for up to an additional 12 months, and if the acquirer requests such an extension, Defendants must notify the United States in writing at least three months prior to the date the supply contract expires. Any amendments to or modifications of any provisions of a supply contract are subject to approval by the United States, in its sole discretion.

Finally, Paragraph IV.P of the proposed Final Judgment requires Defendants, at the acquirer's option and subject to approval by the United States in its sole discretion, to enter into a transition services agreement for a period of up to six months. Among other things, this transition services agreement will ensure that the acquirer has sufficient access to Athenos-related enterprise data and personnel that are knowledgeable about this data, so as to avoid disruption to the Athenos Divestiture Business while Defendants work to transfer this data to the acquirer and the acquirer interviews and makes offers of employment to Athenos personnel. The acquirer may terminate the transition services

agreement, or any portion of it, without cost or penalty at any time upon commercially reasonable written notice. The United States, in its sole discretion, may approve one or more extensions of any transition services agreement for a total of up to an additional six months, and if the acquirer requests such an extension, Defendants must notify the United States in writing at least 30 days prior to the date the transition services agreement expires. Any amendments to or modifications of any provisions of a transition services agreement are also subject to approval by the United States, in its sole discretion. The employees of Defendants tasked with providing transition services must not share any competitively sensitive information of the acquirer of the Athenos Divestiture Assets with any other employee of Defendants.

### B. Polly-O Divestiture Provisions

Paragraph V.A of the proposed Final Judgment requires Defendants, within 30 days after the entry of the Stipulation and Order by the Court, to divest the Polly-O Divestiture Assets to BelGioioso Cheese, Inc. ("BelGioioso") or an alternative acquirer acceptable to the United States, in its sole discretion. BelGioioso is an established cheese producer based in Green Bay, Wisconsin. With the divestiture of Kraft Heinz's Polly-O business, BelGioioso, or an alternative qualified acquirer, will be able to enter or expand ricotta cheese sales to grocery stores and other retailers in New York and Florida. The United States, in its sole discretion, may agree to one or more extensions of the time period to complete the divestiture of the Polly-O Divestiture Assets, not to exceed 60 calendar days in total, and will notify the Court of any extensions. Paragraph V.C of the proposed Final Judgment requires that the Polly-O Divestiture Assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the assets can and will be operated by the acquirer as a viable, ongoing business that can compete effectively in the sale of ricotta cheese to retailers. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and must cooperate with any

acquirer.

The Polly-O Divestiture Assets are defined in Paragraph II.S of the proposed Final Judgment as all rights, titles, and interests in and to all intangible and tangible property and assets, relating to or used in connection with the Polly-O Divestiture Business.[4] These assets include: (1) the Polly-O Brand Name,[5] including the exclusive right to the name in all sales channels (including the retail, foodservice, and ingredients or industrial channels), and all other intellectual property owned, licensed, or sublicensed, including patents, patent applications, and inventions or discoveries that may be patentable, registered and unregistered copyrights and copyright applications, and registered and unregistered trademarks, trade dress, service marks, trade names, and trademark applications; (2) the Shared Recipes License, which is defined in Paragraph II.X of the proposed Final Judgment as a perpetual, royalty-free, paid-up, irrevocable, worldwide, non-exclusive license to the formulas, recipes and related trade secrets, know-how, confidential business information and related data that were used by Kraft Heinz for the production of cheese sold under both the Polly-O Brand Name and any other Kraft Heinz brand name; (3) all contracts, contractual rights, and customer relationships, and all other agreements, commitments, and understandings, including agreements with suppliers, manufacturers, co-packers, and retailers, teaming agreements, leases, and all outstanding offers or solicitations to enter into a similar arrangement; (4) all licenses, permits, certifications, approvals, consents, registrations, waivers, and authorizations, and all pending applications or renewals; (5) all records and data, including customer lists, accounts, sales, and credit records; production, repair, maintenance, and performance records; manuals and technical information Defendants provide to their own employees,

[4] The Polly-O Divestiture Business is defined in Paragraph II.T of the proposed Final Judgment as "the worldwide business of the sale of Polly-O Products by Kraft Heinz." Polly-O Products is defined in Paragraph II.W of the proposed Final Judgment as "any product that Kraft Heinz sold, sells, or has plans to sell under the Polly-O Brand Name anywhere in the world."

[5] The Polly-O Brand Name is defined in Paragraph II.R of the proposed Final Judgment as "Polly-O and any other name that uses, incorporates, or references the Polly-O name."

customers, suppliers, agents, or licensees; records and research data concerning historic and current research and development activities; and drawings, blueprints, and designs; and (6) all other intangible property, including commercial names and d/b/a names, technical information, computer software and related documentation, know-how, trade secrets, design protocols, specifications for materials, parts, and devices, procedures for safety, quality assurance, and control, design tools and simulation capabilities, and rights in internet websites and domain names.

Similar to the Athenos Divestiture Assets, the proposed Final Judgment requires Defendants to divest all rights to the Polly-O Brand Name, which is currently used to sell ricotta, chunk mozzarella, shredded mozzarella, string mozzarella,[6] twist mozzarella-cheddar, fresh mozzarella, asiago, parmesan, romano, and Italian cheese blends. By requiring the full divestiture of the Polly-O Brand Name, the proposed Final Judgment will enable the acquirer to more effectively compete in the sale of ricotta cheese by (1) avoiding the potential consumer confusion and potential harm to the brand that could result from having both the acquirer and Lactalis marketing and selling Polly-O branded cheeses, and (2) by giving the acquirer control over the sale of all Polly-O Products in all three channels of distribution – retail, foodservice and ingredients or industrial. For the same reasons described with respect to the Athenos divestiture provisions, requiring Defendants to divest the full Polly-O Brand Name will preserve competition. Most notably, with respect to the Polly-O Brand Name, it will permit the acquirer to offer both ricotta and chunk mozzarella cheese under the same brand name, which is important for competing in the market for the sale of ricotta cheese to retailers because both cheeses are often promoted in tandem.

[6] Both Defendants also sell mozzarella string cheese in many local areas, particularly in the eastern United States. However, since the proposed Final Judgment requires divesting the entire Polly-O business—including mozzarella string cheese—it fully remedies any potential competitive harm to purchasers of mozzarella string cheese.

Under the Shared Recipes License defined in Paragraph II.X of the proposed Final Judgment, the acquirer will also receive a perpetual, royalty free, paid-up, irrevocable, worldwide, non-exclusive license to the formulas, recipes and related trade secrets, know-how, confidential business information and related data that were used by Kraft Heinz for the production of cheese sold under both the Polly-O Brand Name and any other Kraft Heinz brand name. The Shared Recipes License will enable the acquirer to produce and sell Polly-O cheeses that share recipes with any other Kraft Heinz product.

Paragraph V.H of the proposed Final Judgment also contains provisions intended to facilitate the acquirer's efforts to hire employees whose job responsibilities relate in any way to the Polly-O Divestiture Assets. These provisions are the same as those applicable to employees whose job responsibilities relate in any way to the Athenos Divestiture Assets, as described above. Specifically, Paragraph V.H of the proposed Final Judgment requires Defendants to provide the acquirer and the United States with organization charts and information relating to these employees and to make them available for interviews with the acquirer. It also prohibits Defendants from interfering with any negotiations by the acquirer to hire these employees. In addition, for employees who elect employment with the acquirer, Defendants must waive all non-compete and non-disclosure agreements; vest and pay on a prorated basis any bonuses, incentives, other salary, benefits, or other compensation fully or partially accrued at the time of transfer; vest any unvested pension and other equity rights; and provide all other benefits that the employees would generally be provided had those employees continued employment with Defendants, including any retention bonuses or payments. Finally, the timeline for when these employees may be hired by the acquirer has been set to ensure that employees providing any transition services pursuant to a transition services agreement entered into pursuant to Paragraph V.N of the proposed Final Judgment are

not interrupted.

Paragraph V.H of the proposed Final Judgment further provides that Defendants may not directly solicit to rehire any Polly-O-related employees who were hired by the acquirer, unless an employee is terminated or laid off by the acquirer or the acquirer agrees in writing that Defendants may solicit to rehire that individual. This non-solicitation period runs for 12 months from the date of the divestiture. This provision serves two purposes. First, it promotes a period of stability that will aid the acquirer in assuming control of the Athenos business. Second, many food retailers conduct periodic category reviews in which they evaluate their brand offerings and shelf space allocations, so a one-year non-solicitation period permits the acquirer to complete at least one such category review at most food retailers. It is important to note, however, that this non-solicitation provision does not prohibit Defendants from advertising employment openings using general solicitations or advertisements and rehiring anyone who applies for an opening through a general solicitation or advertisement.

Paragraph II.U of the proposed Final Judgment defines Polly-O Excluded Contracts. These are contracts that BelGioioso has informed Defendants that it does not want included as part of the Polly-O Divestiture Assets. The Polly-O Excluded Contracts are contracts and agreements between Kraft Heinz and Foremost Farms USA Cooperative, Marathon Cheese Corporation, Saputo Cheese USA Inc., Amcor Flexibles North America, Inc., International Paper Company, Berry Global, Inc, Transcontinental US LLC, and J. Rettenmaier USA LP. As an established producer of cheese that has an existing series of suppliers and contracts, BelGioioso reviewed these contracts and determined that it did not need them in order to effectively operate the Polly-O Divestiture Business. To avoid saddling BelGioioso with unnecessary or potentially duplicative contracts, those contracts are excluded from the Polly-O Divestiture Assets. However, if Defendants divest the Polly-O Divestiture Assets to an acquirer other than

BelGioioso, and that alternative acquirer determines it needs these Polly-O Excluded Contracts, Paragraph V.K of the proposed Final Judgment requires Defendants to assign, subcontract, or otherwise transfer any of the Polly-O Excluded Contracts to any such acquirer of the Polly-O Divestiture Assets.

As with the Athenos Divestiture Business, the proposed Final Judgment contains several provisions to facilitate the transition of the Polly-O Divestiture Business to the acquirer. First, Paragraph V.J of the proposed Final Judgment will facilitate the transfer to the acquirer of customer and other contractual relationships that are included within the Polly-O Divestiture Assets. As with the Athenos divestiture provisions above, Defendants must transfer all such contracts, agreements, and customer relationships (or portions of such contracts, agreements, and customer relationships), including all supply and sales contracts and co-packing and packaging supplier agreements, to the acquirer and must use best efforts to assign, subcontract, or otherwise transfer contracts or agreements that require the consent of another party before assignment, subcontracting, or otherwise transferring. Defendants must not interfere with any negotiations between the acquirer and a contracting party. These protections also apply to any of the Polly-O Excluded Contracts that an acquirer other than BelGioioso elects to have assigned under Paragraph V.K of the proposed Final Judgment.

Second, Paragraph V.M of the proposed Final Judgment requires Defendants, at the acquirer's option, to enter into a supply contract or contracts for the production and packaging of Polly-O Products sufficient to meet the acquirer's needs for a period of up to 12 months on terms and conditions reasonably related to market conditions for the production and packaging of Polly-O Products. As with the Athenos divestiture provisions above, supply contracts of this nature are common in this industry; indeed, Kraft Heinz today outsources much of its cheese production to other cheese manufacturers, including its ricotta cheese production. Companies operating in this

industry have experience negotiating and managing these types of supply contracts, and such arrangements are used by other natural cheese brands. In addition, Paragraph V.M of the proposed Final Judgment prohibits employees of Defendants tasked with providing services pursuant to any supply contract from sharing any competitively sensitive information of the acquirer with any other employee of Defendants.

The acquirer may terminate any supply contract described in Paragraph V.M of the proposed Final Judgment, or any portion of any such supply contract, without cost or penalty at any time upon commercially reasonable written notice. The United States, in its sole discretion, may approve one or more extensions of any supply contract for up to an additional 12 months, and if the acquirer requests such an extension, Defendants must notify the United States in writing at least three months prior to the date the supply contract expires. Any amendments to or modifications of any provisions of a supply contract are subject to approval by the United States, in its sole discretion.

Finally, Paragraph V.N of the proposed Final Judgment requires Defendants, at the acquirer's option and subject to approval by the United States in its sole discretion, to enter into a transition services agreement for a period of up to six months. Among other things, this transition services agreement will ensure that the acquirer has sufficient access to Polly-O-related enterprise data and personnel that are knowledgeable about this data, so as to avoid disruption to the Polly-O Divestiture Business while Defendants work to transfer this data to the acquirer and the acquirer interviews and makes offers of employment to Athenos personnel. The acquirer may terminate the transition services agreement, or any portion of it, without cost or penalty at any time upon commercially reasonable written notice. The United States, in its sole discretion, may approve one or more extensions of any transition services agreement for a total of up to an additional six months, and if the acquirer requests such an extension, Defendants must notify the United States in writing at least 30 days prior to the date the transition services agreement

expires. Any amendments to or modifications of any provisions of a transition services agreement are also subject to approval by the United States, in its sole discretion. The employees of Defendants tasked with providing transition services must not share any competitively sensitive information of the acquirer of the Polly-O Divestiture Assets with any other employee of Defendants.

### C. Divestiture Trustee Provisions

If Defendants do not accomplish the divestitures within the time periods prescribed in Paragraphs IV.A and V.A of the proposed Final Judgment, Section VI of the proposed Final Judgment provides that the Court will appoint a divestiture trustee selected by the United States to effect any remaining divestitures. If a divestiture trustee is appointed, the proposed Final Judgment provides that Defendants must pay all costs and expenses of the trustee. The divestiture trustee's commission must be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After the divestiture trustee's appointment becomes effective, the trustee must provide monthly reports to the United States setting forth his or her efforts to accomplish the remaining divestitures. If the remaining divestitures have not been accomplished within six months of the divestiture trustee's appointment, the United States may make recommendations to the Court, which will enter such orders as appropriate, in order to carry out the purpose of the Final Judgment, including by extending the trust or the term of the divestiture trustee's appointment.

### D. Ricotta Notification Requirement Provisions

Section XII of the proposed Final Judgment requires Lactalis to notify the United States at least 30 days in advance of acquiring, directly or indirectly, in a transaction that would not otherwise be reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the "HSR Act"), any assets or any interest in any entity involved in the sale of ricotta cheese to retailers in the United States. Pursuant

to the proposed Final Judgment, Lactalis must notify the United States of such acquisitions as it would for a required HSR Act filing, as specified in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, except that the information requested in Items 5 through 8 of the instructions must be provided only about the sale of ricotta cheese to retailers in the United States. The proposed Final Judgment further provides for waiting periods and opportunities for the United States to obtain additional information analogous to the provisions of the HSR Act before such acquisitions can be consummated.

The reason for this requirement for ricotta cheese is that there is evidence of strong regional variation in brand strength in ricotta cheese. Accordingly, Lactalis could purchase a regional brand of ricotta that is very important to competition in that particular region, but that purchase might be small enough on a national level not to require a filing under the HSR Act. Given Lactalis's strong presence in the sale of ricotta cheese nationwide, it is important for the United States to receive notice of regional transactions which could have the potential to substantially reduce competition in this industry. Requiring notification from Lactalis before acquisition of an entity involved in the sale of ricotta cheese to retailers will permit the United States to assess the competitive effects of that acquisition before it is consummated and, if necessary, seek to enjoin the transaction.

### E. Compliance and Enforcement Provisions

The proposed Final Judgment also contains provisions designed to promote compliance with and make enforcement of the Final Judgment as effective as possible. Paragraph XV.A provides that the United States retains and reserves all rights to enforce the Final Judgment, including the right to seek an order of contempt from the Court. Under the terms of this paragraph, Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may

establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance with the Final Judgment with the standard of proof that applies to the underlying offense that the Final Judgment addresses.

Paragraph XV.B provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to remedy the loss of competition the United States alleges would otherwise result from the Transaction. Defendants agree that they will abide by the proposed Final Judgment and that they may be held in contempt of the Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XV.C provides that if the Court finds in an enforcement proceeding that a Defendant has violated the Final Judgment, the United States may apply to the Court for an extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph XV.C provides that, in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, the Defendant must reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with that effort to enforce this Final Judgment, including the investigation of the potential violation.

Paragraph XV.D states that the United States may file an action against a Defendant for violating the Final Judgment for up to four years after the Final Judgment has expired or been terminated. This provision is meant to address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the

Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

### F. Term of the Final Judgment

Section XVI of the proposed Final Judgment provides that the Final Judgment will expire 10 years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestitures have been completed and that the continuation of this Final Judgment is no longer necessary or in the public interest.

## IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE PLAINTIFFS

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment neither impairs nor assists the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

## V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions

entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the *Federal Register*, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, the comments and the United States' responses will be published in the *Federal Register* unless the Court agrees that the United States instead may publish them on the U.S. Department of Justice, Antitrust Division's internet website.

Written comments should be submitted in English to:

Eric D. Welsh
Chief, Healthcare and Consumer Products Section
Antitrust Division
United States Department of Justice
450 Fifth Street NW, Suite 4100
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

## VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Lactalis's proposed

acquisition of Kraft Heinz's natural cheese business in the United States. The United States is satisfied, however, that the relief required by the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for the sale of feta cheese sold to retailers in the United States and ricotta cheese sold to retailers in the New York Metro Market and in each of the Florida Metro Markets. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation but avoids the time, expense, and uncertainty of a full trial on the merits.

## VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

Under the Clayton Act and APPA, proposed Final Judgments, or "consent decrees," in antitrust cases brought by the United States are subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in

Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a proposed Final Judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's Complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "make de novo determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). "The court should also bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19-2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability

to negotiate future settlements," contrary to congressional intent. *Microsoft*, 56 F.3d at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." (internal citations omitted)); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case."). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (*quoting W. Elec. Co.*, 900 F.2d at 309).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20

("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged."). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

## VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final

Judgment.

Dated: December 20, 2021

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA:

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